BROADCASTING AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS:

JUSTIFICATIONS FOR RESTRICTING FREEDOM OF EXPRESSION

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"One cannot look to the liberty of expression for one individual or group of individuals without raising the question of the effect upon the exercise of that freedom on the liberty of others".

Morris Manning,
Rights, Freedoms and the Courts
(1983) at 204.

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SUMMARY

Freedom of expression is an important fundamental freedom. The freedom to express one's thoughts, opinions and beliefs is necessary to support democracy, promote truth through a free marketplace of ideas, and to create opportunities for personal fulfillment. Yet, despite its importance, freedom of expression is not absolute. The right of free expression is often restricted when it conflicts with other rights and fundamental freedoms and limits to free expression have been recognized in the Canadian Charter of Rights and Freedoms.

Under the Charter the courts may now review the substance of legislation and some executive action for compliance with its protections. Section 2 protects freedom of expression in the following terms:

> Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The explicit inclusion of "other media of communication" makes it clear that the broadcast media will enjoy at least the same freedom of expression accorded individuals. Other relevant Charter sections to freedom of expression in broadcasting include s. 1 and ss. 15 and 28 dealing with equality rights. With the exception of the elevated status given to equality between men and women the Charter grants equal protection to the rights and freedoms it enunciates.

While freedom of expression has not been singled out for special protection, any balancing of competing rights and interests should accommodate its importance. Historically, philosophically, and as a matter of social policy, those who purport to restrict freedom of expression have been called upon to justify the intention, effect and terms of their proposed restriction. Legally, a similar process of justification is now required under s. 1 of the Charter. As the Charter's protection of freedom of expression is not absolute, s. 1 acknowledges that certain limitations on this fundamental freedom are both possible and proper. Where a claimant establishes that legislation limiting a right or freedom constitutes a breach of one of the Charter's section, the burden of proof shifts to the government to establish that the limitation satisfies the three separate requirements of s. 1; that it is a reasonable limitation, prescribed by law and demonstrably justified in a free and democratic society. In deciding whether the requirements of s. 1 are met the court is called upon to balance competing rights and interests. The government's justification for limiting freedom of expression is therefore of crucial relevance.

In the future we can expect that the C.R.T.C., as a government agency, will be called upon to justify its activities which may inhibit free expression and it will succeed or fail in this justification according to the requirements established by s. 1. Although the Broadcasting Act does not permit the prior restraint of information or images, there are several other mechanisms which control the content of broadcasting and consequently raise freedom of expression issues. In this paper we assume that all regulation affecting program content infringes the Charter's s. 2 protection of freedom

of expression. We therefore organize our discussion on broadcasting and freedom of expression according to three broad categories of justifications which can be alleged in support of certain limitations on expression. These "justifications" merely represent the legal, philosophical and social arguments supporting restrictions; we do not mean to suggest that the court will necessarily accept them or that they are universally recognized as justified restrictions.

The three categories of justification are first, the quest for fairness or balance in broadcasting, recognized in the United States as the 'fairness doctrine'; second, the threat of harm if freedom of expression is unregulated; and third, the impairment to equality principles if freedom of expression is unregulated. These categories are cumulative and alternative so all three justifications can usually be argued in aid of any given restriction. For example, program regulations directed against violent pornography can arguably be justified on the alternative grounds that the unregulated broadcasting of violent pornography creates a social imbalance in broadcasting, causes harm to society and is a form of unlawful sex discrimination against women. We discuss each possible justification separately although there is some overlap between them.

1. The quest for balanced broadcasting in Canada and the American fairness doctrine seek to justify restrictions on one person's freedom of expression when it improperly conflicts with another person's freedom of expression and it applies exclusively to broadcasting media. These concepts recognize that

the reality of limited airwaves is often inconsistent with the theory of a free marketplace of ideas underlying unrestricted free expression. The argument is made that some restrictions on freedom of expression are necessary to protect another person's or another group's freedom of expression. Under this first justification for limiting free expression the judicial balancing process involves the competition between two claims to free expression.

The broadcasting regulations which require a Canadian programming content and regulate political broadcasting are seen as examples of regulations which may be justified by the desire to promote fairness and balance in broadcasting. Fairness or balance in broadcasting limits the broadcast media's freedom to present programming of its own choosing. Broadcasters have the potential power to air only the material they so desire and in a manner reflecting their own viewpoints. This potential conflicts with the broadcaster's social responsibility to provide the public with exposure to a broad range of ideas and opinions. The American fairness doctrine is based on the idea that airwaves are public property and subject to governmental control. The broadcast media is therefore obliged to present issues of public concern, air both sides of these issues and provide politically, socially and culturally balanced broadcasting.

The principles of the American fairness doctrine do not apply in Canada as yet but they have been recognized in the White Paper on Political and Controversial Broadcasting Policies where the following four principles of the Canadian Broadcasting Corporation were stated:

(1) the air belongs to the people, who are entitled to hear the principle points of view on all questions of importance;

(2) the air must not fall under the control of any individuals or groups influenced by reason of their wealth or special position;

(3) the right to answer is inherent in the doctrine of free speech;

(4) the full interchange of opinion is one of the principle safeguards of free institutions.

American broadcasters have objected to "fairness doctrine" controls on the grounds that they violate freedom of expression, but the American courts have nevertheless upheld them, saying: "[t]he First Amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many." We predict Canadian courts will be persuaded and encouraged by the American fairness doctrine and find that the public's right to free expression is abridged if it is denied the opportunity to hear a balance of political and controversial expressions and to communicate responses. Arguably regulatory methods to apportion scarce frequencies can be constitutionally justified to ensure that the Canadian broadcasting medium remains open as a conduit for free expression.

This reasoning may be used to justify certain Canadian content regulations. Concern for the wide scale effects of the American broadcasting industry and its threat to Canadian cultural development have prompted restrictions on the freedom of the broadcast media. The regulations which require a Canadian content quota for television stations are a prima facie infringement on the right to free expression, which must be justified under s.

1 of the Charter. The legislative history of broadcasting will assist the government in their argument that Canadian content regulations are a reasonable limitation on free expression; a limitation designed to ensure the presentation of programming balanced by a Canadian perspective. Looking back through the years to 1932 when the Broadcasting Act was enacted, it is apparent that the primary policy thrust has been to ensure Canadian domination over all facets of the Canadian broadcasting industry. To this historical view of Canadian content regulations one may add two other perspectives: first, the economic concern for protecting Canadian cultural industries and second, that Canadian content regulations are consistent with Canada's international obligations. Regulations controlling the broadcast media during a political election campaigns may also be supported in terms of the need for political balance fairness and the broadcaster's social responsibility.

2. The second type of justification for restricting freedom of expression is based on the concept of harm. As free expression may cause damage, restrictions are often argued to be justified on the basis that they are required to prevent harm. When this justification is invoked it is alleged that the harm to society which may result from unregulated expression is greater than the harm which may result from its restriction. Relevant examples of this approach include the criminal law prohibition against obscenity and hate propaganda, the Broadcasting Act prohibition of obscene, indecent or profane images, proposed restrictions on violence and the civil law of defamation. As both the concept of harm and the balancing process between competing rights involve large subjective elements, the debate in any individual case

will centre on whether there is sufficient harm to warrant government intervention.

We try to explain how the operative definition of and approach to harm will determine which expressions can be justifiably regulated. We study the definitions and approaches based on a conservative philosophy, a liberal philosophy or a feminist philosophy because we believe these are the three dominant philosophies in this area. None of the three philosophies contend that freedom of expression is absolute. All agree that unregulated expression is capable of causing harm. The question, therefore, is not whether there should be any constraints on expression, but rather, where to draw the line. An understanding of these philosophies is therefore essential to anyone attempting to develop broadcasting policies as each takes a different approach to the basic purpose of freedom of expression, the value of freedom of expression, the perceived harms which result when freedom of expression is unregulated and the consequences when it is regulated. Conservatives, liberals and feminists have very different responses on how certain subjects should be regulated: including such important matters as obscene, profane and indecent depictions, hate propaganda and the exposure of children to violence.

We use the criminal law of obscenity as a case study to discuss the content and relevance of these philosophies to broadcasting policy and freedom of expression. We chose the criminal law of obscenity because it illustrates the marked divergence between these philosophies and it raises issues of fundamental importance in relation to broadcasting and freedom of expression.

(Being a law of general application, the Criminal Code prohibition against obscenity applies to broadcasting.)

The conservative view of freedom of expression is based on the assumptions that societies are entities in themselves, with shared values and moralities, and that society is justified in protecting its morals by law because societies disintegrate without a common morality. As a result of these assumptions, conservatives judge the effect of expression by evaluating its impact on valued societal institutions. If the expression poses a threat to the organizational structure of society, there is sufficient justification to regulate or censor the expression by law. Any activity can be justifiably curtailed as long as it causes feelings of intolerance, indignation and disgust in the community; it is irrelevant that it may occur in private and/or cause no direct harm to other individuals.

Liberal thinkers perceive freedom of the individual as the ultimate value to be protected by freedom of expression. Unlike conservatives, liberals see the social order not as a valued end in itself but as a means to achieve individual freedom and security. It is individual self-expression and self-fulfillment which are seen as ends in themselves, rights which should ideally be free from majoritarian or state direction. The liberal view of freedom of expression assumes there are no universal truths and that speech can never be legitimately curtailed unless measurable harm would directly result from the unregulated expression. The requirement of direct harm is also known as the "clear and present danger" test.

While liberals generally see the law as an inappropriate vehicle to deal with most sexual expression, exceptions to the rule are recognized when some measurable, recognized harm can be attributed to the expression or when sexual expressions are broadcast on limited public air waves or channels. The fact that the broadcast medium is a limited resource persuades liberals that privileged licensees are not in the same position as ordinary citizens and cannot raise the same arguments regarding legal controls on broadcast communications.

The feminist philosophy posits that any interpretation of the relationship between law and morality must take into account the unequal distribution of rights in society. They believe that women do not have the same freedom of expression that men have, and if freedom of expression is to be truly protected in Canada, the substantive impact of sexual expression on women's rights must be addressed. It is their view that if certain forms of sexual expression undermine women's constitutionally guaranteed rights to equality, they are harmful and can be legitimately curtailed. Feminists claim that sexual expressions which qualify as pornography damage women's right to equality and physical security. Such expressions cause a public, generalized harm which damages women's equality by reinforcing the erroneous but widespread idea that women are inferior and entitled to only a limited role within society. Feminists disagree with the assumptions, application and consequences of the conservative approach to freedom of expression and criticize the liberal approach for their gender-neutral, universalist application of the individual rights principle, for their narrow

characterization of "harm"; and for their reliance on the "marketplace of truth" in an age where it no longer applies.

We review the law of obscenity as a case study of how these three philosophies affect the law, both in its enactment and judicial interpretation. It is our thesis that since the obscenity laws were enacted there has been a movement away from the conservative philosophy. At first this movement was towards the liberal philosophy, but now, there is every indication that the movement is away from the liberal approach to an acceptance of the feminist philosophy. As we study the obscenity provisions in the Criminal Code we see that their rationale is based on the conservative philosophy. Subsequent judicial interpretation of the obscenity sections, by adopting and defining a community standards test, shows an acceptance of certain aspects of liberal thinking on the topic of freedom of sexual expression. Lately, and increasingly, however, the judicially defined community standards test has recognized the feminist's emphasis on equality rights. Many recent government reports also support the trend towards an increasingly feminist approach to obscenity laws. The marked trend towards a feminist analysis is perfectly consistent with the Canadian Charter of Rights and Freedoms, which grants a wide protection to equality rights and a special status to gender equality rights. This trend effects all restrictions, not just those relating to obscenity laws, which use the harm justification for limiting free expression.

We also review the Broadcasting Act to examine how it defines harm and regulates sexual expression. The Broadcasting Act was amended while this shift from conservative to liberal to feminist occurred, it is therefore not

surprising that the legislation contains examples of each approach. As the Broadcasting Act is not subject to the same intensive and extensive judicial review as the Criminal Code obscenity provisions, it is unlikely that judges can give an equality based interpretation to these provisions. This means that legislative action is required to completely and consistently ensure that the protection of equality rights also underlies the Broadcasting Act restrictions on free expression.

The legal regulation of hate propaganda is another topic which is allegedly justified on the basis of the prevention of harm. It is argued that hate propaganda harms the group against which it is targeted and the egalitarian underpinnings of our democratic society. The production and distribution of hate propaganda is presently controlled by the Criminal Code, and regulations under the Broadcasting Act. Each statue has a different purpose and a different definition of hate propaganda but both constitute a prima facie infringement on s. 2's right to freedom of expression. To withstand a constitutional challenge the government must demonstrate that the infringements are reasonable, prescribed by law and are demonstrably justified in a free and democratic society.

Opponents of hate propaganda laws argue against legal regulations on the grounds of principle, proof and pragmatism: that such laws offend the principle of free expression; there is insufficient proof of harm to satisfy the clear and present danger test; and in practical terms there is no reason why hate propaganda should be singled out for legal controls. On the other hand, the rationale for legal controls on hate propaganda is the harm which

results to the targeted groups and our social fabric from unregulated representations. This justification is arguably more consistent with Canada's constitutional priorities, public policy, standards in other democratic countries and international responsibilities and in the one case where the constitutionality of one of the criminal hate propaganda provisions was questioned, it was found to qualify under s. 1 of the Charter as a reasonable limit, prescribed by law in a free and democratic society.

We also briefly present some observations on the topic of violence in broadcasting within the context of the harm justification. Broadcasting that includes violence is not specifically addressed in the Broadcasting Act or Regulations, yet certain arguments suggest that regulations in this area are justified, constitutionally supportable, and permissible under the current Broadcasting Act. In order to justify regulations or the use of the licencing power to limit violence in broadcasting, evidence of harm must exist such that it presents cause for governmental concern and action. There is a strong consensus of expert opinion that television is a potent medium. During the past 22 years, widespread and diverse scholarship have found links between televised and actual violence, particularly with respect to young viewers. Medical authorities have indicated that violence in television poses a health threat to children. In 1976 in Canada, the Royal Commission on Violence in the Communication Industry noted that the average Canadian child spends more than 12,000 hours in school by the end of high school and in the same period spends even more hours in front of the television set. This 'harm' however, is criticized by the liberals on the basis that these studies do not

conclusively establish the "clear and present danger" liberal believe is necessary before legislative controls are warranted.

After reviewing the laws on obscenity, hate propaganda and violence we note that increasingly, legislators and judges are broadening the concept of harm, and thereby increasing the number and expanding the content of reasonable limitations on free expression. To the extent that harm may now mean harm to either the social fabric, individual dignity and egalitarian principles, the judicial test has gone beyond the clear and present danger test proposed by the liberals and has moved closer to the feminist definition of harm. The harm caused by a particular type of expression is increasingly judged contextually and its presence or absence can be affected by how the expression is communicated. The nature of the broadcasting medium increases the intensity of recognized harms because of its pervasiveness, persuasiveness and immediacy. The recognition of the nature of broadcasting and an expanded meaning of harm have the effect of expanding the permissible scope of regulatory control over program content under this second justification.

3. The third justification for restricting freedom of expression is when it endangers equality rights. Whether one believes that either liberty or equality is the basic right, equality has been recognized as a fundamental cornerstone of democracy in s. 15 of the Charter. Gender equality has been singled out for added protection through s. 28, which ensures that all other Charter rights, including freedom of expression, must be equally enjoyed by men and women. There is an obvious overlap between these last two

justifications as regulating expression to either prevent discrimination or promote equality can also be justified as preventing harm to equality principles; but because sections 15 and 28 raise particular legal issues we treat the impairment of equality rights as a separate justification for restricting free expression.

While our primary focus is the gender equality rights which justify restrictions on freedom of expression these same sections of the Charter may also impose duties upon the government and its representatives. The equality sections of the Charter are therefore relevant in two ways. First, they may be used to justify restrictions on expression by balancing the competing interests of freedom of expression and equality rights. Second, they may require something of the government by imposing certain standards which must be followed in its broadcasting policy and regulation. While the failure to meet its Charter obligations may open the government to direct attack under s. 15, the extent of its obligations are unclear. At the very least, government controls over the content of broadcasting must not discriminate against individuals or groups on the basis of the prohibited grounds in s. 15. In addition, however, it is arguable that the government's obligation may go further and require it to actively promote equality rights through its broadcasting policy. Section 15 is therefore both a justification for limiting freedom of expression and a potential source of liability.

The relevance of s. 15 to broadcasting policy can be explained and illustrated in the context of programming which contains sex-role or other types of stereotyping. Regulations against stereotyping could be argued to be

justified restrictions on freedom of expression because they protect someone's competing equality rights. On the other hand, the absence of regulation in the face of widespread broadcasting of stereotypic images may constitute unconstitutional discrimination. Arguments can be made against stereotyping on the basis of sex, race, age, national or ethnic origin, subject to the caveat that sex-role stereotyping may stand on a special level due to the added protection given to gender equality under s. 28. There is no doubt that rights to gender equality were intended to enjoy an elevated status. It is arguable that gender equality occupies a preeminent position in the Charter and that it is not to be balanced against other Charter rights.

We study these three justifications for limiting expression in the particular context of commercial speech. Commercial speech involves business advertisements which solicit or give information on a proposed commercial transaction. Commercial speech differs from other types of speech because the speaker has a predominantly financial interest in its distribution. Different forms of commercial speech or advertising are currently subject to various controls under general federal and provincial statutes, specific broadcast statutes and voluntary advertising guidelines.

It is both necessary and appropriate to discuss these restrictions on commercial speech in a separate chapter. Although the same general Charter principles and justifications for restricting expression apply, there is the important threshold issue of whether or not commercial speech is even a protected part of s. 2's "freedom of expression". Although there are few

Canadian cases, a review of the relevant American jurisprudence illustrates the approaches open to a Canadian court, explains the factors which inform the debate and shows the manner and extent in which commercial speech is limited in another "free and democratic" country. In dealing with this threshold issue, we canvass the different ways American courts have treated commercial speech under the First Amendment. At first all forms of advertising were thought to be outside constitutional protection but ten years ago the American Supreme Court revised its position and conferred limited constitutional protection on commercial speech. We rely upon the American experience and conclude that commercial speech will fall within "freedom of expression" in s. 2 of the Canadian Charter.

We outline the level of protection freedom of commercial expression is likely to enjoy by examining when a limitation will be upheld under s. 1 as reasonable, prescribed by law, and justifiable in a free and democratic society. Differences between the nature of political speech and commercial speech suggest that restrictions on commercial speech will not be as rigorously scrutinized as those affecting political speech. We predict that the American trend to give less protection to commercial speech will be mirrored in Canadian decisions by a finding that the government has discharged the burden of proof imposed by s. 1.

We also present the justifications which can be advanced, under s. 1, for limiting certain forms of commercial expression. As in the other chapters of this work, we emphasize justifications based upon the need for balance in broadcasting, the harm which may result if some forms of expression are

unregulated and the harm to equality principals which may result if some forms of expression are unregulated. We discuss each justification, the type of evidence required to justify limitations on commercial speech and the relationship between its level of protection and the manner in which it is controlled.

In the last chapter we move from justifications for restrictions on freedom of expression and briefly discuss the legal form of those restrictions. We examine the relationship between the form of regulation and freedom of expression and conclude that the provisions empowering the CRTC to grant and renew broadcasting licences are justifiable restrictions on free expression due to the public ownership of the airwaves and their scarcity. It is suggested that the CRTC could either exercise its current powers to set the terms and conditions of licences or be granted more extensive licencing related powers and remain within allowable constitutional limits on freedom of expression.

1. INTRODUCTION

Freedom of expression is an important individual right and fundamental freedom. The right to freely express one's thoughts, opinions and beliefs is necessary to support democracy,[1] promote truth through a free marketplace of ideas,[2] and to create opportunities for personal fulfillment.[3] As the Supreme Court of Canada noted in Reference re Alberta Legislation:[4]

> "Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of people to be informed through sources independent of the government concerning matters of public interest. . . . Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the common Law.

Yet, despite its importance, freedom of expression is not absolute.[5] We cannot therefore measure its presence in "zero-sum" terms; on the basis of whether it is either enjoyed in its entirety or not at all.[6] The right of free expression is often restricted when it conflicts with other rights and fundamental freedoms. The proper inquiry requires the balancing of competing rights and interests.The relativity of freedom of expression raises the question of whose rights of expression should be protected and at what social cost.[7]

This balancing approach is consistent with the Canadian Charter of Rights and Freedoms which, with the exception of the elevated status given to equality between men and women, grants equal protection to the rights and freedoms it

enunciates. While freedom of expression has not been singled out for special protection, any balancing of competing rights and interests occurs within the context of its historical importance. Historically, philosophically, and as a matter of social policy, those who purport to restrict freedom of expression have been called upon to justify the intention, effect and terms of their proposed restriction. Legally, a similar process of justification is now required under s. 1 of the Charter, where governments and their representatives must prove that limitations on Charter based rights, including freedom of expression, are reasonable, prescribed by law and are demonstrably justified in a free and democratic society.

In the future we can expect that the C.R.T.C., as a government agency, will be called upon to justify its activities which may inhibit free expression according to the requirements established by s. 1. Although the Broadcasting Act[8] does not permit the prior restraint of information or images, there are several other mechanisms which control the content of broadcasting and consequently raise freedom of expression issues.[9] We have assumed that all regulation affecting program content infringes the Charter's protection of freedom or expression. We have therefore organized our discussion on broadcasting and freedom of expression according to three broad categories of justifications which can be alleged in support of certain limitations on expression. These "justifications" merely represent the legal, philosophical and social arguments supporting restrictions; we do not mean to suggest that the court will necessarily accept them or that they are universally recognized as justified restrictions.

These three categories of justification are the quest for fairness or balance in broadcasting, known in the United States as the 'fairness doctrine'; the threat of harm if freedom of expression is unregulated and the impairment to equality principles if freedom of expression is unregulated. These categories are cumulative and alternative. It can therefore be expected that all three justifications will be argued in aid of any given restriction. For example, program regulations directed against violent pornography can arguably be justified on the alternative grounds that the unregulated broadcasting of violent pornography creates a social imbalance in broadcasting, causes harm to society and is a form of unlawful sex discrimination against women.

The American fairness doctrine and Canadian notions of balance in broadcasting seek to justify restrictions on one person's freedom of expression when it improperly conflicts with another person's freedom of expression and it applies exclusively to broadcasting media. It recognizes that the reality of limited airwaves is often inconsistent with the theory of a free marketplace of ideas underlying unrestricted free expression. The argument is made that some restrictions on freedom of expression are necessary to protect another person's or another group's freedom of expression. Under this first justification the balancing process between rights and interests involves the competition between two claims to free expression.[10] Public ownership of the airwaves means that broadcasters have a social responsibility to act in the public interest and to promote cultural, political and social balance. Notions of balanced broadcasting are often used to justify Canadian content regulations and regulations governing political broadcasting.

The second type of justification for restricting freedom of expression is based on the concept of harm. As free expression may cause damage, restrictions are often argued to be justified on the basis that they are required to prevent harm. When this justification is invoked it is alleged that the harm to society which may result from unregulated expression is greater than the harm which may result from its restriction. Relevant examples of this approach include the criminal law prohibition against obscenity and hate propaganda, the Broadcasting Act prohibition of obscene, indecent or profane images, proposed restrictions on violence in broadcasting and the civil law of defamation. As both the concept of harm and the balancing process between competing rights involve large subjective elements, the debate in any individual case will center on whether there is sufficient harm to warrant government intervention. We explain how the operative definition of and approach to harm will determine which expressions can be "justifiably" regulated. We study the definitions and approaches based on a conservative philosophy, a liberal philosophy or a feminist philosophy because we believe they are the dominant philosophies in this area. We use the law on obscenity as a case study to discuss the content and relevance of these approaches to broadcasting policy and freedom of expression.

The third justification for restricting freedom of expression is when it endangers equality rights. Equality rights enjoy a special status among rights and fundamental freedoms. Whether one believes that either liberty or equality is the basic right, equality has been recognized as a fundamental cornerstone of Canadian democracy in s. 15 of the Charter.[11] Sexual equality has been singled out for added protection through s. 28, which ensures that all other

Charter rights, including freedom of expression, must be equally enjoyed by men and women. There is an obvious overlap between these last two justifications as regulating expression to prevent discrimination or promote equality can also be justified as preventing harm to equality principles, but because sections 15 and 28 raise particular legal issues we treat the impairment of equality rights as a separate justification.

While our primary focus is the competing rights and interests which justify restrictions on freedom of expression there are aspects of the Charter which impose duties upon the government and its representatives. In addition to illustrating how Charter rights can be used to justify restrictions on expression we also discuss how the Charter imposes certain standards which must be followed in broadcasting policy and regulation. This paper will therefore canvass the law in relation to the CRTC's possible position as both a potential defendant justifying its restrictions to a broadcaster and as a defendant answering a complaint that its regulations breach a provision of the Charter, either through its actions or omissions. To understand the basic principles underlying the Charter an introductory chapter on its function and impact is included. This introductory chapter will place the following discussion on fairness, harm and equality in its legal context. We also use these basic Charter principles and these three categories of justification for restricting freedom of speech to study the particular issue of the regulation of commercial speech.

In the last chapter we move from justification for restrictions on freedom of expression and briefly discuss the legal form of those restrictions. We

examine the relationship between the form of regulation and freedom of expression and conclude that the provisions empowering the CRTC to grant and renew broadcasting licences are justifiable restrictions on free expression due to the public ownership of the airwaves and their scarcity. It is suggested that the CRTC could either exercise its current powers to set the terms and conditions of licences or be granted more extensive licencing related powers and remain within allowable constitutional limits on freedom of expression.

FOOTNOTES

1. Switzman v. Elbing, [1957] S.C.R. 285 at 358. Mr. Justice Rand said that parliamentary government was "ultimately government by the free opinion of an open society". It was said to require "the condition of a virtually unobstructed access to a diffusion of ideas".
2. John Stuart Mill, On Liberty (1859).
3. Peter Hogg, Constitutional Law in Canada, 2nd ed. (1985), at 714.
4. [1938] S.C.R. 100.
5. Clare Beckton, "Freedom of Expression", Walter Tarnopolsky and Gerald Beaudoin ed, The Canadian Charter of Rights and Freedoms (1982) at 75, articulated the types of restrictions placed on the freedom of expression.

> In defining its ambit; principles must be evolved to reconcile the rights of different individuals and groups to free expression. Further, the rights to freedom of expression must be reconciled with other valued individual and societal interests, such as the right to privacy, the right to a fair trial and the nation's right to security against hostile forces.

6. Peter R. Russell, "The Effect of a Charter on the Policy Making Role of Canadian Courts" (1982), 25 Can. Pub. Adm. 1.
7. Morris Manning, Rights, Freedom and the Courts, (1983), at 204.

> "One cannot look to the liberty of expression for one individual or group of individuals without raising the question of the effect upon the exercise of that freedom on the liberty of others".

8. R.S.C. 1970, c. B-11.
9. The objects of the CRTC are to regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting

policy enunciated in s. 3 of the Act (s.15). In furtherance of its object, the CRTC has the power to prescribe classes of broadcasting licences (s. 16(1)(a); to make regulations on program standards, advertising, political comment (s. 16(1)(b); to revoke licences (s. 16(1)(c)); to renew licences with or without conditions (s. 17(1)(a)(b)(c); to suspend a broadcasting licence (s. 17(1)(d); and to review and consider any technical matter relating to broadcasting referred to it by the Minister of Communication and make recommendations to him with respect to any such matter (s. 17(1)(f). A very important power in addition to the power to issue, amend or renew broadcasting licences is to make licences subject to conditions which the Executive Committee of the CRTC "deems appropriate for the implementation of the broadcasting policy enunciated in s. 3" (s. 17(1)(a).

10. The remaining justifications differ from the fairness doctrine in two ways. First, they are justifications of general application, which apply to restrictions outside the broadcasting sphere and second, the balancing processes occur between two different rights; only one of which is freedom of expression.

11. See the discussion in Mark R. MacGuigan, "The Protection of Freedom and the Achievement of Equality in Canada" in Gerald Gall ed., Civil Liberties in Canada (1985), 225.

2. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian Charter of Rights and Freedoms is a constitutional document which protects certain rights and fundamental freedoms subject to the government's power to either impose reasonable limits on them, under s.1, or to expressly declare that infringing legislation will operate notwithstanding the Charter under s. 33.[1] The Charter binds both the provincial and federal governments and establishes a new balance between the legislative, executive and judicial branches of our government.[2] Section 52 establishes the primacy of the Charter:

> The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution, is, to the extent of the inconsistency, of no force or effect.

To a large extent, parliamentary sovereignty and unrestricted executive action have been abrogated in favour of constitutionally entrenched rights and freedoms because Canadian courts may now review the substance of legislation, and some executive action for compliance with the Charter's protections.[3] What the content of legislation "is" has become a secondary consideration to what the Charter says it "ought to be". Mr. Justice Estey's recent remarks in Law Society of Upper Canada v. Shapinker explain the Charter's status as a constitutional document and the new role for the judiciary:[4]

> There are some simple but important considerations which guide a court in construing the Charter, and which are more

sharply focussed and discernible than in the case of the federal Bill of Rights. The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada", s. 52, Constitution Act, 1982. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the B.N.A. Act, 1867 (now the Constitution Act, 1867). With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court.

The Charter is not the only legislation which seeks to regulate the relationship between the state and its citizenry; the Canadian Bill of Rights

is the Charter's historic precursor and currently co-exists with the Charter.[5] The provisions in the Bill of Rights therefore maintain a separate legal relevance and the decisions taken under it are often illustrative of judicial principles, approaches and interpretations which may continue to characterize the court's treatment of the Charter. We therefore refer to decisions taken under the Bill of Rights where applicable.

Generally this new constitutional document protects fundamental freedoms, legal rights, political rights and mobility rights. More specifically, s. 2 protects freedom of expression in the following terms:

> Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The explicit inclusion of "other media of communication" makes it clear that the broadcast media will enjoy at least the same freedom of expression accorded individuals, and perhaps more. It has been suggested that the specific inclusion of the "press and other media of communication" may show an intention to give a special, more protected, status to media communications. It is more likely, however, that the phrase "including freedom of the press and other media of communication" was inserted for clarity and not emphasis, with the result that no special constitutional rights were intended to be conferred on the media. The rights of broadcasters will therefore, to the extent the

nature of the media permits, be similar to the rights of free expression enjoyed by individuals.

Other relevant Charter sections to the issue of freedom of expression and broadcasting include ss. 15 and 28. These sections deal with equality rights and should be quoted in their entirety:

> s. 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> s. 28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The rights and freedoms enumerated in the Charter, with the possible exception of the equality rights in s. 28, are on the same legal footing. They are not absolute and may be limited if the exigencies of s. 1 are met.[6] It reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 acknowledges that certain limitations on individual rights and fundamental freedoms are both possible and proper. Where a claimant establishes that legislation limiting a right or freedom constitutes a breach of one of the Charter's section, the burden of proof shifts to the government to establish that the limitation satisfies the three separate requirements of s. 1; that is reasonable, prescribed by law and demonstrably justified in a free and democratic society.[7] For example, Canadian content regulations limit freedom of expression and breach s. 2. The government then has the burden of proof and must attempt to justify this limitation under s. 1 or it may be struck down as unconstitutional.

Under section 1 the government must first establish that its proposed limitation on a Charter right or freedom is "reasonable". The Court will review the limitation for its substantive and procedural reasonableness both in its statement and application.[8] Although no conclusive test of reasonableness has yet emerged, courts appear to require that a limitation

must be proportionate to its intended purpose and must serve a legitimate legislative goal.[9] The Court's balancing of rights and interests will therefore take into account the importance of the infringed right, the extent of the infringement and compare these two factors against the importance of the government interest asserted by way of justification.[10] In determining what is reasonable the courts may consider the type of justifications we discuss.

In a recent decision the court considered the question of reasonableness in the following terms:[11]

(1) Is the object of the legislation a reasonable objective in the advancement of the common good?

(2) Is the legislative programme reasonably appropriate to the furtherance of the object of the legislation?

(3) Is the infringement reasonably necessary to the success of the legislative program?

(4) Is the infringement too great a price to pay for the presumed benefit to be obtained from the legislation?

These questions indicate the wide powers of judicial review our courts have under the Charter to balance constitutionally protected rights and freedoms.

Under s. 1 the second requirement the government must show to support its limitation is that the limitation is "prescribed by law." The "prescribed by law" requirement is intended to ensure that citizens know when,

and to what extent, their rights and freedoms have been limited by government action.[12] The mere existence of a statutory provision or regulation, even one containing a decision-making standard, will not necessarily serve this notice giving function. A statutory or regulatory standard is not therefore automatically "prescribed by law", it must qualify under a judicially defined test which requires specificity and foreseeability.

Two recent cases illustrate how strictly courts may interpret the "prescribed by law" requirement. In Re Ontario Film and Video Appreciation Society and Ontario Board of Censors[13] the Ontario Court of Appeal, affirming the judgment of the Divisional Court, struck down the province's film censorship legislation.[14] The activities of the Censorship Board were a recognized limitation on freedom of expression and legal argument centered on whether this limitation could be supported and saved by s. 1. The Censorship Board formulated administrative standards, published them in a pamphlet and operated under these self-imposed guidelines. Even so, both courts held that the Board's decision-making framework did not impose the minimum standards of certainty and foreseeability required before the Charter limitation resulting from its activities could be said to be "prescribed by law". The Divisional Court's explanation is worth quoting at length:[15]

> "The next issue is whether the limits placed on the applicant's freedom of expression by the Board of Censors were 'prescribed by law'. It is clear that statutory law, regulations and even common law limitations may be permitted. But the limit, to be acceptable, must have legal force. This is to ensure that it has been established

democratically through the legislative process or judicially through the operation of precedent over the years. This requirement underscores the seriousness with which courts will view any interference with the fundamental freedoms.

The Crown has argued that the board's authority to curtail freedom of expression is prescribed by law in the Theatres Act, ss. 3, 35 and 38. In our view, although there has certainly been a legislative grant of power to the board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression of filmmakers have not been legislatively authorized. The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal, for it depends on the discretion of an administrative tribunal. However dedicated, competent and well-meaning the board may be, that kind of regulation cannot be considered as 'law'. It is accepted that law cannot be vague. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law."

Similarly, in Luscher v. Deputy Minister, Revenue Canada[16] the court followed the general approach in the Ontario case even though the impugned customs legislation contained a statutory decision-making standard. It prohibited the importation of:

"Books, printed paper, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious, or of an immoral or indecent character."[17]

The government argued that prohibition was a proper limitation on freedom of expression. To establish that the limitation was "prescribed by law" under s. 1 it relied upon the statutory articulation of the standards of "immoral" and "indecent" and their judicial interpretation. The Federal Court of Appeal rejected the government's argument and invalidated this prohibition. Mr. Justice Hugessen adopted the reasoning and rationale of the Ontario Censor Board case:[18]

> "In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences."

This strict approach may be used to scrutinize government imposed limitations on freedom of expression in the broadcast industry. Any limitations must

therefore be sufficiently specific to quality as "law" and this will require careful drafting.

In attempting to fulfill s. 1's last requirement, that the limitation is demonstrably justified in a free and democratic society, the laws of other such societies are important. In relation to limitations on freedom of expression American case law under the First Amendment of the United States Bill of Rights[19] can provide assistance to Canadian courts. While the United States Bill of Rights does not contain a section comparable to s. 1, the United States Supreme Court has developed numerous doctrines to ensure that First Amendment protections are not restricted by governments without some justifications.

The government's justification for limiting legislation is therefore of fundamental importance. If the government cannot meet all of the requirements of s. 1, it cannot justify its limitation on protected rights and freedoms, the court may use the broad remedial powers conferred by s. 24(1). It reads:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Courts also have the power under s. 52(1) to declare that, "any law that is inconsistent with the provisions of the Constitution is of no force or effect". These sections allow a court to strike down unconstitutional legislation or executive action. There is a general recognition that these sections give courts wide remedial powers but there is some discussion on just how far

courts may now go in exercising their new powers. The extent to which such innovative remedies such as reparative injunctions can be used to enforce the government's Charter obligations will be discussed later in the chapter on Equality Rights.

FOOTNOTES

1. Section 33 reads:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Quere: does this apply to s. 28 which operates notwithstanding all other Charter sections; including s. 33?

2. For a general discussion see Gerald V. LaForest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 Can. Bar Rev. 19; Peter Hogg, "Supremacy of the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 69; Peter R. Russell, "The Effect of a Charter on the Policy Making Role of Canadian Courts" (1982), 25 Can. Pub. Adm. 1 and see Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 30 at 51.

3. Operation Dismantle [1985] 18 D.L.R. (4th) 481.

4. Law Society of Upper Canada v. Shapinker (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161 at 167-8.

5. This co-existence results from s. 24 in the Charter.

6. The proper effect of the interrelationship sections 1 and 28 raise interesting questions of statutory interpretation. Arguably the government has no power to impose restrictions on the basis of sex, even if they are reasonable, prescribed by law and demonstrably justified in a free and democratic society as s. 28 operates "notwithstanding" or despite s. 1.

7. Hunter v. Southam, [1984] 2 S.C.R. 145. Peter Hogg, Constitutional Law of Canada 2nd ed. (1985), at 688 argues that the government properly bears this burden as s. 1 requires that the limitation is "demonstrably justified" and that s. 1 is an exception to other guaranteed rights.

8. The approach taken by the Supreme Court in Hunter v. Southam, id., suggests that both the object and effects of legislation or administration practice must be canvassed when determining reasonableness. This widens the scope of judicial review and increases the likelihood that a limitation will be found to be unreasonable as it can be disqualified on two different bases.

9. See Re Federal Republic of Germany and Rauca (1983), 145 D.L.R. (3d) 638, 41 O.R. (2d) 225 (Ont. C.A.); Re Anti-Inflation Act, [1976] 2 S.C.R. 373; A.G. Que. v. Que. Assc. of Protestant School Boards, [1984] 10 D.L.R. (4th) 321 (S.C.C.); Re Reich and College of Physicians and Surgeons of the Province of Alberta (1984), 8 D.L.R. (4th) 696, 31 Alta. L.R. (2d) 205 (Q.B.).

10. Peter Hogg, supra, n. 7 at 688.

11. Re Anti-Inflation Act, [1976] 2 S.C.R. 373, id. Note the similarity with the questions proposed by Chief Justice Deschenes in Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 10 D.L.R. (4th) 321 (S.C.C.):

> 1. A limit is reasonable if it is a proportionate means to attain the purpose of the law;
> 2. Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and
> 3. The courts must not yield to the temptation of too readily substituting their opinion for that of the legislature.

12. P. Hogg, supra, n. 7 at 684.

13. Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984), 5 D.L.R. (4th) 766, 45 O.R. (2d) 80, 7 C.P.R. 129C(Ont.) (1983), aff'g (1983), 41 O.R. (3d) 583, (Ont. Div. Ct.) 34 C.R. (3d) 73

14. Theatres Act, R.S.O. 1980, c. 498, ss. 3(2)(a)(b), 35, 38. The Ontario Theatres Act provided that:

> 3(2) The Board has power,
> (a) to censor any film and, when authorized by the person who submits film to the Board for approval, remove by cutting or otherwise from the film any portion thereof that it does not approve of for exhibition in Ontario.

15. Supra n. 13 at 83.

16. (1985) 17 D.L.R. (4rth) 503 (F.C.A.).

17. Tariff Item 99201-1 of Schedule C, read in conjunction with section 14 of the Customs Tariff, R.S.C. c. C-41.

18. Supra, n. 16 at 506.

19. 1st Amendment reads:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for redress of their grievances.

3. BALANCE IN BROADCASTING AND THE AMERICAN FAIRNESS DOCTRINE

Notions like balance in broadcasting and the American fairness doctrine seek to justify restrictions on one person's freedom of expression when it improperly conflicts with another person's freedom of expression. They apply exclusively to the broadcasting media. They recognize that the reality of limited airwaves is often inconsistent with the theory of a free marketplace of ideas underlying unrestricted free expression. The argument is made that some restrictions on freedom of expression are necessary to protect another person's or another group's freedom of expression. Public ownership of the airwaves means that broadcasters have a social responsibility to act in the public interest and to promote cultural, political and social balance. Under this justification the necessary balancing process involves the competition between two claims to free expression. The broadcasting regulations which require a Canadian programming content and regulate political broadcasting are examples of regulations which may be justified on the basis of the quest for balance in broadcasting and the preservation of the public's right of free expression.

A. The Origins of Balance in Broadcasting and the American Fairness Doctrine

Before discussing the current content of balance in broadcasting and the American fairness doctrine and their limits as a justification for restricting freedom of expression, a brief discussion of their theoretical foundations provides their historical context. The origin of these ideas is best understood after a review of three different views of the relationship between the government and the media. These three views have been labelled the

authoritarian, libertarian and social responsibility views on the relationship between the government and the media. These three views are relevant because ideas like balance in broadcasting and the American fairness doctrine are an outgrowth and logical extension of the social responsibility view and these specific views on communications theory have equivalents in the more general conservative, liberal and feminist philosophies used to discuss the harm justification in the next chapter. The principles underlying the authoritarian view of government and media, and the conservative philosophy are alike, the libertarian view coincides with the liberal philosophy and the social responsibility view and feminist philosophy share numerous parallels.

The "authoritarian" view of government and media contends that people are inherently weak and subject to corruption and are therefore in need of a well-structured disciplined society.[1] In an authoritarian state, preservation of a strong state is the most important value and individuals are only valuable in a collectivity.[2] Under the authoritarian view the media should be used "for the good of the state" and to promote social unity and continuity. Authoritarian governments have devised numerous methods to control the media,[3] all to ensure that only its conception of the "truth" is heard.[4]

Unlike authoritarians, libertarians view public communication as a tool that should serve individuals, not the state. They believe the media should strive for diversity rather than unity and that the media should contribute to change as well as continuity. Libertarians see the media as having a responsibility and right to criticize the government in power.[5] It wasn't until the nineteenth century that the libertarian view began to overtake

authoritarianism.[6] Philosophers such as John Milton, Immanuel Kant, Thomas Jefferson and John Stuart Mill shaped the libertarian philosophy and greatly influenced the development of the media. Their ideas gave rise to a code of three "rights" of the mass media: the right to print; the right to criticize and the right of access.[7]

The underlying tenets of the libertarian view have been very influential in the development of media systems in democratic and pluralistic societies. Often democratic societies are identified and measured by the extent to which the press is free from government control: they are judged by the extent to which the media provides mass education and enlightenment, gives the information on which self-government depends, safeguards individual liberties against unwarranted government intervention, maintains the structure of capitalistic libertarianism and free enterprise through advertising,[8] secures the profit necessary to remain self-sufficient and independent, and provides entertainment.[9]

The third view of the relationship between the government and the media, is the social responsibility view. It is a pragmatic modification of the libertarian approach. It places the libertarian view into a modern context by taking into account the fallibilities and realities of human beings and democratic societies. It also recognizes that modern media operate within a highly competitive context and that modern urbanization, technological complexities and social problems have changed the relationship between the government and the media.[10]

The social responsibility view is largely a reaction to how libertarian theory failed to address the extent to which technology has changed the world. This view makes three major criticisms of the libertarian view. First, as more and more media outlets have come to be controlled by fewer and fewer owners, access to the media for newcomers or minority interests has become more and more difficult, making the libertarian view of the media as a free marketplace of ideas more of a hope than a reality. Second, the media have become controlled by big business, who appear to be more interested in revenue than the dissemination of a wide variety of information. Third, the media is said to have distorted reality, leading the population in one direction or another for its own ends, rather than serving as a vehicle for the search for truth.

Under the social responsibility modification of liberalism, the mass media is expected to assume responsibilities and act in the public interest.[11] Creation of press councils in 1970 and legislative provision for public hearings for broadcast licences were implemented as instruments to make mass media weigh their responsibilities carefully.[12] The fairness and balance doctrines, truth in advertising laws and election regulations are examples of legislative intervention based on the social responsibility model.

B. An Overview of Balance in Broadcasting and the American Fairness Doctrine

Balance in broadcasting limits the broadcast media's freedom to present programming of its own choosing. There has existed, from the early inception of radio, a recognition that broadcasters, if left to their own devices, had

the potential power to air only the material they so desired and in a manner reflecting their own viewpoints. This possibility conflicted with the broadcaster's social responsibility to provide the public with exposure to a broad range of ideas and opinions.

This potential power, coupled with the tremendous influence of the media, led to the enactment of legislation in both the United States and Canada to regulate the broadcast industry. Airwaves were considered to be public property and subject to governmental control. In the United States the broadcast media is obliged to present issues of public concern and air both sides of these issues.[13] These two requirements are commonly known as the "Fairness Doctrine". In Red Lion Broadcasting v. F.C.C.,[14] the United States Supreme Court explained the nature of this obligation:

> It is the right of the viewers and listeners, not the right of broadcasters, which is paramount . . . . It is the right of the public to receive access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

The obligations imposed by the American fairness doctrine include the responsibility to provide politically, socially and culturally balanced broadcasting. Similar ideas in Canada, although they do not share the legal force of the American doctrine, are known under the rubric of balanced broadcasting. Balance in this context means ensuring firstly that the media do not use their position to manipulate public opinion and secondly, that all

major points of view on a given issue are presented equitably.[15]

Political balance is vital for ensuring public exposure to a wide range of diverse issues and viewpoints.[16] The second face of balance is a social one concerned with the "portrayal of all segments of Canadian society" and "the avoidance of distorted views and stereotypes."[17] This aspect of balance in broadcasting is of concern because of the powerful role of the media "on the socialization of our children and its potential to re-enforce or challenge our attitudes and assumptions toward other human beings."[18] In contrast to political balance which is directed primarily to "news, informational and public affairs programming,"[19] social balance is focussed on entertainment programming and advertisements.[20] This face of balance has become considerably more important over the past few decades owing to the harmful effects that negative stereotyping has had, increasing violent and pornographic program content, and the absence from programming of positive images of women, native peoples, the disabled, and other disadvantaged groups in Canadian society.

Cultural balance appears closely tied to social, and to some extent, political balance. The recognition of the two official languages in Canada is enshrined in s. 3(e) of the Broadcasting Act, by entitling Canadians, "to broadcasting service in English and French". As s. 3(g)(iii) of the Broadcasting Act states, the broadcasting system has the responsibility of "actively contributing to the flow and exchange of cultural and regional information and entertainment". The place of cultural balance is reinforced by s. 27 of the Charter. This section clearly indicates the intention of Canadians to

ensure that the preservation and enhancement of the multicultural heritage of Canada remains a reality.[21]

The need to provide broadcasting services to all parts of Canada, reflecting the diverse needs of each region has been voiced time and again by numerous groups. In 1983, the Department of Communications stated in Towards a New National Broadcasting Policy, that there was a need to provide broadcasting services for Native peoples as:[22]

> The recent proliferation of English and French Services, reflecting the values and lifestyles of southern, non-native Canadians, has been a mixed blessing to many native northerners. While they find much of value in these services, they are critical of the virtually total lack of programs related to their own languages and cultures.

C. The Legal and Policy Basis of Balance in Broadcasting

Section 3(d) of the Broadcasting Act requires licensees to provide varied and comprehensive programming and

> "should provide reasonable, balanced opportunity for the expression of differing views of matters of public concern . . ."

Section 16(b)(iii) allows the CRTC to make regulations regarding the equitable use of the broadcasting media for political purposes.[23] In a CRTC announcement of March 28, 1972, the CRTC noted that where a broadcaster was in breach of a duty "to provide equitable opportunity for the expression of differing

views," the matter would be taken into consideration at license renewal time.[24]

As early as 1961, the Board of Broadcast Governors issued the White Paper on Political and Controversial Broadcasting Policies. It detailed the following four principles reflecting policies of the Canadian Broadcasting Corporation:

(1) the air belongs to the people, who are entitled to hear the principle points of view on all questions of importance;

(2) the air must not fall under the control of any individuals or groups influenced by reason of their wealth or special position;

(3) the right to answer is inherent in the doctrine of free speech;

(4) the full interchange of opinion is one of the principle safeguards of free institutions.[25]

In a CRTC announcement of July 9, 1970 from the Report of the Special Committee on "Air of Death",[26] the Committee commented on the issue of balance in broadcast editorials:

> "The Committee does not interpret the requirement for "balance" in the Broadcasting Act as a directive that every program must, of necessity, describe all sides of an issue, provided that in the context of total programming legitimately controversial issues are dealt with fairly and honestly. The Committee realized that in some instances it is impossible to describe all sides of an issue. For example, the Committee argued, "it would be patently ridiculous

> requiring a program attacking air pollution to be balanced with a program lauding such a condition."[27]

However, where the subject matter lends itself to reply, the CRTC has clearly emphasized the duty of the broadcaster to provide balanced broadcasting. In the case of CHNS Halifax v. The Halifax-Dartmouth Committee for Miles for Millions,[28] the CRTC censured the station for its editorial attack on the Miles for Millions march. The station failed to provide notice to the group attacked, provide a transcript of the attack, and provide a reasonable opportunity for the group to respond to the attack over the licensee's facilities. The station's behaviour violated the recommendations contained in the White Paper.

Even though the Broadcasting Act and regulations do not go so far as requiring the positive obligation to provide response time, the spirit of the provisions and decisions of the CRTC support balance in broadcasting wholeheartedly. In the United States, the fairness doctrine is specifically spelled out in legislation. Section 315(a) of the Communications Act states:

> ". . . Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting news on issues of public importance.[29]

Undeniably, regulation motivated by the desire to obtain balance in broadcasting constitute CRTC controls over programming. American broadcasters have objected to this type of programming controls on the grounds that they violate freedom of expression, but the American courts have nevertheless upheld them. The first case before the Supreme Court of the United States dealt with the fairness doctrine rules governing personal attacks and editorials. In Red Lion Broadcasting Co. v. F.C.C.[30] the court unanimously upheld the Federal Communications Commission's order to the broadcaster to provide equal time to the author who had been attacked over the air. Mr. Justice White, writing for the court said:

> [a]lthough broadcasting is clearly a medium affected by a First Amendment interest . . . differences in the characteristics of news media justify differences in the First Amendment standards applied to them.[31]

Justice White underlined the principle of public interest when he said,

> "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favour of others whose views should be expressed on this unique medium . . . It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount.[32]

Although there are no similar Canadian decisions upholding the right to reply, the reasoning in the Red Lion case may be followed in Canada because the three First Amendment arguments raised by the broadcasters in that case could equally be made under s. 2 of the Charter. They claimed that: 1) the fairness doctrine infringed their freedom of speech; forcing them to allow an opportunity to respond allegedly reduced their freedom to provide other programming; 2) the fairness doctrine was too vague to pass First Amendment standards; and 3) they questioned the assumption of the fairness doctrine that broadcast frequencies were still scarce. The Court decided all the arguments against the broadcasters in favour of the Commission. The Red Lion case is said to be the most significant broadcasting decision of the American Supreme Court.[33] It squarely upholds the fairness doctrine and provides strong support for other programming decisions the Federal Communications Commission may make. The rational underlying the decision is founded on the same public interest considerations reflected in the Broadcasting Act and in the White Paper on political and controversial broadcasting policies.

The American Commission has acted aggressively in response to the implicit mandate of the Red Lion decision. Renewal licences have been denied when licensees shirk their fairness doctrine responsibilities. In particular, the Commission responded unfavourably to the harassment of interviewers on discussion programs, unbalanced and unfair treatment of different religious faiths, numerous personal attacks, and inaccurate statements.[34] In response to the broadcasters argument on freedom of expression, the Court responded, "[t]he First Amendment was never intended to protect the few while providing them with a sacrosanct sword and shield" with which they could injure the

many."[35]

In the later case of Columbia Broadcasting System (CBS) v. Democratic National Committee,[36] the Court set some limits on the fairness doctrine and made it clear that access to broadcasting by the public is not unlimited. The issue in the CBS case was whether or not a "responsible" group has a constitutional right to purchase air time and make known their views about controversial issues of public importance. The U.S. Supreme Court held that there is no such right of access under the Constitution and that freedom of expression does not require the sale of time to responsible groups.[37] The Court emphasized that the balancing of freedom of expression interests must take place within the context of the regulatory scheme imposed on the broadcast media, adding that an unlimited right of access to air time would not serve the public interest. If everyone had a constitutional right to purchase air time the views of the affluent could prevail, valuable broadcast time might be wasted by groups concerned with trivialities and complete rights of access might change "public trustee" broadcasting into a system of self-appointed editorial commentators.[38] The Court limited the fairness doctrine's right of access to situations where the interests of the public are found to outweigh the private journalistic interests of the broadcasters.[39]

In summary, under the American fairness doctrine the public's right to free expression is abridged if it is denied opportunities to hear a balance of political and controversial expressions and to communicate responses. Therefore, the use of regulatory methods to apportion scarce frequencies and require this balance can be constitutionally justified by the need to ensure

that the broadcasting medium is kept open as a conduit for free expression. It has been alleged that:[40]

> This policy of balanced presentation encouraging non-media voices to express themselves is properly deemed an implementation of freedom and speech and press and not a violation of it.

D. Canadian Content Regulations

Mass media has had a tremendous impact on the fabric of Canadian society. Concern for the wide scale effects of the American broadcasting industry and the perceived threat which it poses for Canadian cultural development prompted restrictions on the freedom of the broadcast media. The goal of the Canadian content regulations for radio and television as expressed in s. 3(b) of the Broadcasting Act, is to protect Canadian culture:

> . . . the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, social and economic fabric of Canada.

Section 3 of the Broadcasting Act reveals two very strong policy directions relating to the media: the need to protect Canada from cultural domination from the United States;[41] and the need to promote national, political and social consciousness.[42] Study after study has shown that Canadian media should play a prominent role in defending Canada's identity and that the federal government should be instrumental in using the nation's media resources to realize this function.[43]

The regulations which require a Canadian content quota for television stations is a prima facie infringement on the right to free expression, which must be justified under s. 1 of the Charter. The legislative history of broadcasting will assist the government in their argument that Canadian content regulations are a reasonable limitation on free expression; a limitation designed to ensure the presentation of programming balanced by a Canadian perspective. Looking back through the years to 1932 when the Broadcasting Act was enacted, it is apparent that the primary policy thrust has been to ensure Canadian domination over all facets of our broadcasting industry. As then Prime Minister R.B. Bennett stated:[44]

> This country must be assured of complete Canadian control of broadcasting from Canadian sources, free from foreign interference or influence. Without such control, radio broadcasting can never become a great national concern and for the diffusion of national thought and ideals, and without such control it can never be the agency by which national consciousness may be fostered and sustained and national unity still further strengthened.
>
> . . .
>
> No other scheme than that of public ownership can ensure to the people of this country, without regard to class or place, equal enjoyment of the benefits and pleasure of broadcasting . . . I cannot think that any government would be warranted in leaving the air to private exploitation and not serving it for the use of the people.

Another early indication of the desire to ensure the development of a Canadian broadcasting system was the establishment of the Canadian Broadcasting Corporation (CBC).[45]

While there have been numerous changes to the terms of the Canadian control regulations over the years, the underlying rationale has remained consistent with the 1932 Broadcasting Act. Each subsequent amendment reiterated the need for protecting Canadian sovereignty in broadcasting. For example, the Report of the Fowler Royal Commission on Broadcasting emphasized the need to ensure Canadian domination of the broadcasting industry - otherwise it would become a mere adjunct of the larger American broadcasting industry:[46]

> If we want to have radio and television contribute to a Canadian consciousness and a sense of identity, if we wish to make some part of the trade in ideas and culture move east and west across the country, if we seek to avoid engulfment by American cultural forces, we must regulate such matters as importation of programmes.

As a result, changes to the Broadcasting Act in 1958 saw the establishment of the Board of Broadcast Governors. They were charged with the responsibility of maintaining, "the continued existence and efficient operation of a national broadcasting system and the provision of a varied and comprehensive broadcasting service of a high standard that is basically Canadian in content and character.[47]

In 1959, the new Board of Broadcast Governors formulated, for the first time, Canadian content regulations for television.[48] A subsequent Committee on Broadcasting, established in 1965, found that the Canadian content regulations had not served their intended purpose, partially because they were not adequately enforced. The emphasis of this Committee's Report was again, on ensuring that the broadcasting industry reflected the interests of Canadians. As they stated, "A population of 20 million people surely must have something of its own to say, and broadcasting is an instrument by which it must have an opportunity to express itself."[49]

This attitude was also reflected in the White Paper on Broadcasting in 1966.[50] The House of Commons Standing Committee on Broadcasting, Films and Assistance to the Arts concurred with the thrust of the White Paper and emphasized the importance of a distinctly Canadian broadcasting system.[51] As a result of the two reports, the Broadcasting Act was amended in March 1968, legislating the CRTC into existence. The CRTC then, in turn, exercised its mandate to create further Canadian content regulations. The implementation of a new Broadcasting Act in 1968[52] indicated firmly that the policy objectives contained in the 1932 Act remained intact through ss. 3(b)[53] and 3(d).[54] The creation of the Canadian Radio-Telecommunications Commission was to assist with these statutory objectives. Again, Canadian content regulations served as one method for their fulfillment.[55]

To the historical justification of Canadian content regulations one may add the economic concern for protecting Canadian cultural industries.[56]

Eliminating Canadian content quotas would arguably result in an economic disservice for the participants in many facets of the industry, with the exception of broadcasters, however, who would profit from importing cheaper American productions.[57] The recognition that there would be an incentive for profit motivated television broadcasters in Canada to import foreign and primarily U.S. programs, rather than produce Canadian programs, has resulted in a call for stricter content controls to protect Canadian industry.[58]

It is also arguable that Canadian content regulations are consistent with Canada's international obligations.[59] In contrast, Clare Beckton, in "Freedom of Expression", suggests that Canadian content regulations might infringe Canadian's obligations under the International Covenant on Civil and Political Rights.[60] Article 19 of the Covenant states:

> (1) Everyone shall have the right to hold opinions without interference;
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
>
> (3) The exercise of these rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain

restrictions but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputation of others;

(b) for the protection of national security or of public order (order public), or of public health or morals.

Beckton raises the point that Canadian content regulations may not be justified under paragraph 3 of Article 19. If the content regulations are viewed only as restrictions based on public policy, which is the position taken by the Canadian government, Article 19, paragraph 3 will not apply and regulations are permissible. Canada can also argue that without Canadian content regulations, Canadians will not have the ability, as provided by paragraph 2 of Article 19, to receive and impart information and ideas of all kinds, because they will be overwhelmingly inundated with American programming. This deprivation of uniquely Canadian material therefore might provide sufficient justification.

It could be argued that Canadian content regulations are necessary for the conservation, the development and the diffusion of Canadian culture. It is probably inevitable that Canadian content regulations will be challenged under the Charter. The freedom of expression argument can serve both sides. On the one hand, broadcasters will say Canadian content requirements are censorship because they exercise government control over what Canadians may see and hear. Conversely, others have argued that the dominance of one state over another, even if unplanned, stifles a society's self-expression, and could be the most vulgar censorship of all.[61] Only when we view individual

broadcasters as private operators exclusively seeking to maximize their profits is there a concern that Canadian content requirements appear as an infringement of their freedom of expression. The reality, however, is that the airwaves remain public property and their allocation under the licencing scheme entails the imposition of social responsibilities, not merely the acquisition of legal rights.

As this historical and economic discussion has sought to demonstrate, Canadian content regulations could be justified as a restriction on broadcaster's freedom of expression, on the basis that they are necessary for promoting the development of a uniquely Canadian cultural identity and protecting Canadian culture from the onslaught of predominantly American broadcasting.

E. Political Broadcasting

Freedom of expression in broadcasting is stringently limited during election campaigns. Radio and television coverage of political campaigns and controversial commentary are controlled in considerable detail. Broadcasting regulations govern such things as advertising and selling time, the identification of sponsors, allocation of time to candidates and political parties and the right to respond. In addition to controls under the Broadcasting Act, further controls are imposed by the Canada Elections Act[62] which forbid premature publication or release of election results and also requires broadcasters to provide balanced broadcast time, some of it without charge, to registered political parties.

The CRTC is given the power to decide the allocation of broadcast time, although no direction to the CRTC is provided in the legislation on the method of time allocation. The current practice is for representatives of political parties represented in the House of Commons to meet with the broadcasting industry, the Chief Electoral Officer, and the CRTC to determine the schedule and amounts of time. If agreement cannot be reached, the matter is referred to the CRTC for resolution. The regulations also provide broadcast time for parties not represented in the House of Commons. No one who is not a candidate, official agent, or any other person acting on behalf of a candidate with the candidate's actual knowledge and consent or the agent of a political party can expend money on the use of broadcasting facilities to promote or oppose a candidate or party.

The effect of the Elections Act and Broadcasting Act is to provide a controlled closed system of political "advertising" where political parties and candidates are given a monopoly over certain forms of political expression because individual citizens are prohibited from broadcasting political views where they involve an expenditure of money. Whether or not these limitations on the broadcast media will be upheld on a s. 2 challenge will depend upon the Court's view of the worth of the justifications that support them. These controls are rationalized in terms of the need for political balance in broadcasting and the broadcaster's social responsibility.

We have already outlined the four policy principles[63] stated in the White Paper on Political and Controversial Broadcasting. These concepts of free speech and the right to reply also underlie the regulation of political

broadcasting. The White Report states that these principles are not well served by the sale of time to individuals or political parties. Cases decided by the CRTC uphold the centrality of the needs for balance in political broadcasting. In 1968, the CRTC was called upon to decide whether or not a broadcasting personality running for political office should be required to resign as a broadcaster. The Commission decided the matter using fairness as the test. The Commission said that if the broadcaster continued in his on-air job while running for office, he would have an "inequitable advantage" over other candidates. The conflict could be resolved in one of two ways: either by offering similar facilities to the opposing candidates, or having the broadcaster/candidate discontinue his career as a broadcaster until the election was completed.[64] In two other cases,[65] involving similar facts, CRTC rulings reflected the concern for fairness and balance and the view that broadcasters have unique responsibilities as trustees of the public interest.[66]

Outside the broadcast media, however, the need for balance cannot persuasively justify limitations on political campaigning. In a recent case involving the use of other forms of media expression, the need for balance was not important enough to outweigh a person's right of freedom of expression. In the case of the National Citizens' Coalition v. A.G. Canada,[67] certain provisions of the Canada Elections Act were struck down as unwarranted infringements on freedom of expression. These provisions prohibited certain citizens from incurring election expenses during an election campaign and prohibited political advertisements or posters unless authorized.[68]

The Attorney General of Canada defended the impugned provisions by arguing that they provided fair and equal procedures for the election of members of Parliament which actually protected freedom of expression because they placed expenditure limits on political parties and balanced the time between them. These limits were said to result in a greater exchange of opinions and ideas than would otherwise be the case if the restrictions did not exist because if private individuals and groups were not excluded from political "advertising", the absence of spending limits may give an unfair advantage to those with large funds. The Crown also argued that if the Elections Act provisions were a limitation on freedom of expression, then the benefit to society of an effective, equitable system for the election of members of Parliament outweighed the freedom of expression of special interest groups during election campaigns.

Justice Medhurst rejected these arguments finding that the Crown failed to show sufficient proof of harm and imbalance to justify these limits on free expression:

> "Care must be taken to ensure that the freedom of expression as guaranteed by s. 2 of the Charter is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that may occur are not adequate for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified."[69]

Justice Medhurst did not examine the issue of election expenditures and freedom of expression in broadcasting which arise from his decision.

Now that s. 70.1(1) has been struck down, private citizens or groups can incur "election expenses" and "election expenses" include, broadcasting time. The question which arises is, whether or not interested third parties may now demand broadcast time so that they can make their political views known. It is unlikely that a future court will extend the National Coalition case into the broadcast medium because of the concept of public ownership of the airwaves. This was underlined in a recent decision of the Federal Court of Appeal, Re N.B. Broadcasting Co. Ltd. and CRTC.[70] The Court stated that freedom of expression guaranteed in s. 2 of the Charter does not include a right for anyone to use the radio frequencies which, before the enactment of the Charter, had been declared by Parliament to be and had become public property and subject to the Broadcasting Act.[71] Even if an interested third party could demand broadcast time, the Elections Act and Broadcasting Act provisions which embody the concept of balance in broadcasting would probably be upheld in the public interest.

The other requirements, such as timeliness, the division of time between viewpoints and the prohibition of premature disclosure of election results, might also be challenged as unwarranted infringements on freedom of expression. Timeliness requirements, which prohibit political advertising at certain times, are direct limits on free speech which may not be justifiable under s. 1 of the Charter. In the United States provisions stipulating when speech could be broadcast have been struck down as unconstitutional.[72] It is

difficult to see what countervailing state interest would be sufficient to satisfy the requirement of s. 1 of the Charter but in Re C.F.R.B. and A.G. Can. (No. 2)[73] the Ontario Court of Appeal said that the prohibition of political advertising at certain times did not violate freedom of expression protections under the Canadian Bill of Rights.

The prohibition on premature publication or release of election results was designed to prevent voters in one part of the country from being influenced by results elsewhere. It is unclear whether or not a Court would accept this rationale as meeting the requirements of s. 1. The prohibition may not be demonstrably justifiable in a free and democratic society because the increasing development of satellite distribution technology, outside the jurisdiction of the CRTC and the Canada Elections Act, may effectively usurp the effect of this prohibition.

Similary, the requirements to provide balanced time will probably be upheld but the allocation of time by the CRTC could be challenged because the legislation provides no direction as to how the Commission is to make the time allotments.

F. Conclusion

The obligation to provide politically, culturally and socially balanced programming can be seen as a justifiable part of the broadcaster's social responsibility. In exchange for access to limited publically owned airwaves broadcasters are required to safeguard the audience's freedom of expression.

Restrictions on a broadcaster's freedom of expression, like Canadian content regulations and the control of political broadcasting, will be weighed against the community's freedom of expression, to determine whether the restriction is reasonable, prescribed by law and justifiable in a free and democratic society under s. 1 of the Charter. In this respect the government may seek to justify certain restrictions on the broadcaster's freedom of expression by showing that it conflicts with another person's freedom of expression.

FOOTNOTES

1. Donald N. Wood, Mass Media and the Individual (1983) at 34.

2. Distrust of the people is an attitude which results from this philosophical premise. Merrill and Lowenstein, Media, Message and Men: New Perspectives in Communication, 2nd ed. (1974) at 156-157, describe the authoritarian state:

> A desire for strong government, a fear of the masses, an inclination to personal arrogance based on felt superiority, a respect for power, a hatred for anarchy, and a desire to control these - among others - are the natural proclivities of the elitists and authoritarians . . .
>
> The basic characteristic of the authoritarian orientation is political and intellectual arrogance by a small elite group having a deep-rooted suspicion of the masses.

3. These included issuing state licences to printers and publishers so no one could operate a printing press without government permission; prior censorship by official sources before material could be printed or disseminated; punishment after publication through a number of laws but particularly, treason and sedition; government ownership and operation of media channels; and government subsidization of private channels. See F.S. Siebert, T.B. Peterson, Wilbur Schramm, Four Theories of the Press (1956).

4. The authoritarian view of truth has three fundamental characteristics: it flows from the top down; it is subject to revision and reinterpretation by the top authorities; it is the standard for the rest of the society. It is belief in these three characteristics of truth that shape the way an authoritarian state sees the role of the media.

5. Wilbur Schramm, Responsibility in Mass Communication (1957).

6. Ibid., at 72.

7. See Lenord Levy, ed. Freedom of the Press from Zenger to Jefferson: Early American Libertarian Theories (1966). The right to print is the rule against prior censorship and prior licensing of the press. The right to criticize came about in response to punishment after publication, particularly for offences such as "seditious libel" which "consisted of scandalizing the government by reflecting on those who were entrusted with the administration of public affairs, by publishing material tending to breed in the people a dislike of their governors, or by alienating the affections of the people from the government in any way." Now the right to criticize is only limited by certain individual rights and the national security. Drawing the line between these competing interests is a continuing problem. The right of access is an ongoing battle between government and the press. Freedom of information legislation has opened government records to public scrutiny but numerous exceptions weaken the legislation.

8. Ibid., p. 52.

9. The entertainment function of the mass media include two underlying principles of libertarian philosophy. First, in a free society, individuals should be able to seek out whatever entertainment form they like, without censorship. There should be no arbitrator of taste. Second, the entertainment function of the media is required to attract a sufficient audience so that other libertarian goals are achieved. However, economic development in the 20th century associated with mass media cast libertarian ideals into doubt. The open and free marketplace of ideas

was eroded by near total dependency upon advertising, and media, at best, was freed into a dual socio-political and economic role.

10. Carl L. Becker, New Liberties (1941), at 93.

"What confuses our purposes and defeats our hopes is that the simple concepts upon which the Age of Enlightenment relied with assurance have lost for us their universal and infallible quality. Natural law turns out to be more than a convenient and temporary hypothesis. Prescriptive rights have such validity only as prescriptive law confers upon them. Liberty, once identified with emancipation of the individual from government restraint, is now see to be inseparable from the complex pattern of social regulation. Even the sharp, definitive lines of reason and truth are blurred. Reason, we suspect, is a function of the animal organism, and truth no more than the perception of discordant experience pragmatically adjusted for a particular purpose and for the time being.

11. At the turn of the century, Joseph Pulitzer was a strong voice calling out for social responsibility in the press:

> "Without high ethical ideals a newspaper not only is stripped of its splendid possibilities for public service, but may become a positive danger to the community.

Joseph Pulitzer, "The College of Journalism" North American Review, 178 (May 1904): 667.

12. W.C. Soderlund, W.I. Romanow, E.D. Briggs, R.H. Wagenberg, Media and Elections in Canada (1984).

13. Ford Rowan, Broadcast Fairness: Doctrines, Practice, Prospects (1984) at 4.

14. 395 U.S. 367, at 390.

15. David MacDonald, "Choice and Justice in Canadian Television" Ottawa, CRTC Research Directorate (1981) at 1. In his view, the Broadcasting Act should be amended to include political balance,

> "phrased in terms of the right of Canadians (a) to be informed on all major issues of importance to them (b) in a way that is free from journalistic prejudice, partisan influence, or other vested opinion, and (c) accords equitable treatment to all relevant points of view. This objective stresses balance in both selection and presentation of issues.

16. Ibid., at 5.

17. Ibid., at 5.

18. Ibid., at 5.

19. Ibid., at 5.

20. The Task Force.

21. CRTC Public Notice released in July, 1985, stated:

> Representatives of national cultural organizations emphasized that ethnic programming should serve as a bridge to enable groups to overcome cultural barriers; increase access by ethnic groups to conventional radio and television and to cable services; foster cultural appreciation and promote encounters among all Canadian cultural groups; and assist immigrants to acquire at least one of Canada's official languages.

22. Canada. Dep't. of Communications. Towards A New National Broadcasting Policy. Ottawa: Min. of Supply and Services, (1983) at 17.

23. Regulations govern advertising and calling time, identification of parties and sponsors, the broadcasting of election results, the allocation of time to candidates and parties interpreting them, and the right to respond. These sections, as well as CRTC decision delineate the duty of broadcasters to cover issues of importance in a balanced fair way.

24. CRTC Announcement, March 28, 1972. Complaint Against Radio Station CHNS, Halifax, by the Halifax-Dartmouth Committee for Miles for Millions.

25. Canada, Board of Broadcast Governors, White Paper on Political and Controversial Broadcasting Policies (1961).

> The Commission does not exercise censorship. It does not restrict the nature of material to be broadcast, except that such material must conform with its printed regulations.
>
> The policy of the Commission, with regard to controversial broadcasting, is based on the following principles:
>
> 1. The air belongs to the people, who are entitled to hear the principle points of view on all questions of importance.
> 2. The air must not fall under the control of any individual or groups influenced by reason of their wealth or special position.
> 3. The right to answer is inherent in the doctrine of free speech.
> 4. The full interchange of opinion is one of the principle safeguards of free institutions.
>
> The best safeguard of freedom of discussion is a policy which permits opportunity for the expression of varying points of view.
>
> In accordance with its policy of resisting any attempts to regiment opinion or to abuse the freedom of speech, the Commission lays down no specific rulings covering controversial broadcasting. The Commission itself supports the policy of the fullest use of the air for;
>
> (a) Forthright discussion of all controversial questions;
>
> (b) Equal and fair presentation of all main points of view;

(c) The discussion of current affairs and problems by informed authoritative and competent speakers.

Broadcasting is a changing and evolving art and no fixed permanent criteria can be set down for the best method of presenting controversial material.

These policies have been adopted in an effort to ensure that the medium of broadcasting may remain at the disposal of the nation, regardless of party, section class or religion.

26. The Report was released following a hearing on March 18-20, 1969 (hearing C7) in connection with the CBC program "Air of Death".
27. Supra, note 26.
28. CRTC Announcement March 28, 1972.
29. 47 U.S.C.A. s.s. 315(a).
30. 395 U.S. 367 (1969), aff'g 381 F.2d 908 (D.C. Civ. 1967).
31. 395 U.S. at 386.
32. Ibid., at 390.
33. J.A. Albert, "Constitutional Regulation of Televised Violence" (1978), 64 Virginia L.R. 1299.
34. See Brandywine-Main Line Radio, Inc., 24 F.C.C. 2d 18 (1970) aff'd, 473 F.2d. 16 (D.C. Cir. 1972), 412 U.S. 922 (1973), at 24 F.C.C. 2d p. 23, 26, 28, 34-35.
35. 473 F.2d at 62.
36. 412 U.S. 94 (1973).
37. Ibid, 120.

38. The Court added that the fairness doctrine was not applicable to advertisements, 412 U.S. at 125.

39. 412 U.S. at 110.

40. Supra n. 13.

41. Mark Starowitz, in a speech entitled "Open Skies: The Struggle For Canadian Airwaves," The Alkinson Lecture at Ryerson Polytechnical Institute, March 12, 1985 at 5, makes the interesting observation that in regard to television, Canada has adopted wholesale, "the complete television output of a neighbouring country," which is of course, the United States. Canada's television media has earned the dubious reputation, of being subject to the process of "Canadianization".

> In Europe, it has become the catchword . . . for what not to do if you want to protect your national culture. . . . Two major documentaries have been aired in Europe (German . . . and Belgian Television) exclusively devoted to what they call "the tragedy of the Canadian television situation." Electronically, we have made ourselves a third world country, accepting the second-hand culture of the United States.

42. W.C. Soderlund, W.I. Romanow, E.D. Briggs, R.H. Wagenberg, supra, note 12 at 102.

43. Ibid.

44. Quoted in David Eliis, Evolution of the Canadian Broadcasting System: Objectives and Realities, 1928-1968. Ottawa: Minister of Supply and Services, (1979) at 8-9.

45. Through the provisions of the Canadian Broadcasting Act, the CBC received a mandate to function as a national broadcasting system by regulating all networks and the programming of all private stations. Additionally, the

CBC could make recommendations regarding the licensing of new stations to the Governor-in-Council. 1936, c. 24.

46. Canada. Report of the Royal Commission on Broadcasting, 1957, at 110.

47. Broadcasting Act, S.C. 1958, C-22.

48. Robert E. Babe, Canadian Television Broadcasting Structure, Performance and Regulation. Ottawa: Economic Council of Canada, 1979.

> [f]ully aware that the new television network, if unregulated, would concentrate on the importation of American entertainment and offer a minimum of Canadian programming . . . otherwise, the conduct of the private network would be antithetical to the Parliamentary objectives set for broadcasting.

49. Canada. Report of the Committee on Broadcasting 1965. Ottawa: Queen's Printers, 1965, at 35.

50. Secretary of State. White Paper on Broadcasting. Ottawa: Queen's Printer, (1966) at 5:

> the situation in 1966 is no different from that at any point in our history . . . Any statement of policy relating to broadcasting Canada therefore starkly poses this question. How can the people of Canada retain a degree of collective control over the new techniques of electronic communication that will be sufficient to preserve and strengthen the political, social and economic fabric of Canada, which concerns the most important objective of public policy.

Another example of the economics at stake for domestic industry can be gleaned from the imposition of Canadian content regulations for radio by the CRTC in 1970. Commented one group of authors:

> This requirement of Canadian music triggered a rapid expansion in the recording industry, which "seemed to develop overnight." In one year in Toronto, the recording capability of 16-track studios increased from one studio to six. Most Canadian radio stations, several of which had claimed earlier that Canadian talent was not to be found, were soon broadcasting in excess of the 30 percent requirement.

51. Canada, House of Commons Standing Committee on Broadcasting, Films and Assistance to the Arts, Report on the White Paper on Broadcasting 1969 (Ottawa: The Queen's Printer, 1967), p. 4.

52. R.S.C. 1970, C-16.

53. Section 3(b) of the Act declared that:

> "The Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."

54. Section 3(d) further stated:

> The programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources.

55. As one author has commented; in regard to such regulations:

> Canadian content quotas are pivotal in comprehending the regulation of broadcasting by the CRTC. . . . The public purpose with which broadcasting has been cloaked is manifested . . . by Canadian content requirements.

> 56. As the publication, Towards A New National Broadcasting Industry, Ottawa, Minister of Supply and Services, 1983 at 8 indicated:
> Quite apart from its cultural importance, the dollars and jobs at stake . . . are considerable. The 1,312 stations, networks and cable systems and the 1,886 broadcasters that together form the Canadian broadcasting system, collectively generate more than $2 billion in revenues each year: the Canadian program production and broadcasting industries employ some 75,000 Canadians.

57. See Paul Audley, Canada's Broadcast Industries. Toronto: James Lorimer and Co., 1983, at 301-02.

58. Ibid.

59. It can also be argued that Article 15 of the International Covenant on Economic, Social and Cultural Rights would provide a justification for Canadian content requirements. This provision reads as follows:

> 1. The State Parties to the present Covenant recognize the right of everyone:
> (a) to take part in cultural life;
> (b) to enjoy the benefits of scientific progress and its applications;
> (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

60. Clare Beckton, "Freedom of Expression" in W. Tarnopolsky and G. Beaudoin ed. The Canadian Charter of Rights and Freedoms (1982) 75.

61. Harry J. Boyle (Vice Chairman, CRTC) an address to the Second National Conference of Journalists, Ottawa, March 1972.

62. R.S.C. 1970, 14 (1st. Supp.), as am. Election Expenses Act, S.C. 1973-74, c. 51 amending Canada Election Act.

63. Supra, note 25.

64. Canada, CRTC Announcement: Broadcasters as Political Candidates, May 24, 1968 (Ottawa: CRTC, 1968).

65. Canada, CRTC Announcement: Broadcasters as Political Candidates, July 17, 1972 (Ottawa: CRTC 1972).

66. For a discussion of principles, see S.W. Head, Broadcasting in America: A Survey of Radio and Television, 3rd ed. (1976) at 398-400.

67. National Citizens' Coalition Inc. et al. v. A.G. Canada, [1984] 5 W.W.R. 436 (Q.B. Div.).

68. Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.), s. 70.1(1) [en. 1973-74, c. 51, s. 12.

69. Supra, note 67 at 453.

70. (1985), 13 D.L.R. (4th) 77.

71. Ibid., at 89. Leave to appeal to the Supreme Court of Canada has been granted.

72. Mills v. Alabama, 384 U.S. 214 (1966).

73. (1974), 38 D.L.R. (3d) 335.

4. THE PREVENTION OF HARM

A second justification for restricting free expression is based on the concept of harm.[1] As free expression may cause damage, restrictions are often argued to be justified on the basis that they are required to prevent harm. When this justification is invoked it is alleged that the harm to society which may result from unregulated expression is greater than the harm which may result from its restriction. Relevant examples of restrictions on freedom of expression justified because they prevent a perceived harm include the criminal law prohibitions against obscenity and hate propaganda, the Broadcasting Act prohibition against obscene, indecent and profane images proposed restrictions on violence and the civil law of defamation. As both the concept of harm and the balancing process between competing rights involve large subjective elements, the debate in any individual case will center on whether there is sufficient harm to warrant government intervention. We will explain how the operative definition of and approach to harm will determine which expressions can be justifiably regulated. These definitions and approaches can be based on a conservative philosophy, a liberal philosophy or a feminist philosophy.

An understanding of these philosophies is essential to anyone attempting to develop broadcasting policies as each has a different approach to the basic purpose of freedom of expression, the value of freedom of expression, the perceived harms which result when freedom of expression is unregulated and the consequences when it is regulated. None of the three philosophies contend that freedom of expression is absolute. All agree that unregulated expression is capable of causing harm. The question, therefore, is not whether there

should be any constraints on expression, but rather, where to draw the line. Conservatives, liberals and feminists therefore have very different responses on how certain subjects should be regulated. This includes such important matters as obscene, profane and indecent depictions, hate propaganda and exposure of children to violence.

The motivation of legislators, the decisions of courts and the opinions of individuals relating to freedom of expression can generally be traced to one of these three philosophies. Legislators regulate expression when they perceive "harm". Courts uphold legislation which limits freedom of expression only when it is "reasonable" and what is reasonable also depends on what qualifies as a harm which can be restricted to maintain the public good. Similarly, an individual's opinions on the limits to freedom of expression also depend on the concept of "harm". The content of the concept of harm and everything which turns upon it, depends upon whether the conservative, liberal or feminist approach is adopted. Much of the disagreement both between and among legislators, courts and individuals on restricting freedom of expression can be traced to each operating under different underlying philosophies.

We present these different philosophies and approaches in the context of sexually explicit representations. We use a case study methodology to give a potentially esoteric discussion a concrete context. We chose the criminal law of obscenity for the case study for two reasons: first, it illustrates the marked divergence between these approaches and second, it raises issues of fundamental importance in relation to broadcasting and freedom of expression. Being a law of general application, the Criminal Code prohibition against

obscenity applies to broadcasting. We will also study how the Broadcasting Act regulates sexually explicit representations.

A. Different Philosophical Views on Freedom of Expression

a) The Conservative View of Freedom of Expression

The conservative view of freedom of expression is based on two fundamental assumptions. The first assumption is that societies are entities in themselves with shared values and moralities. Second, society is justified in protecting its morals by law because societies disintegrate when no common morality is observed. As a result of these assumptions, conservatives judge the effect of expression by evaluating its impact on valued societal institutions. If the expression poses a threat to the organizational structure of society, there is sufficient justification to regulate or censor the expression by law. Any activity can be justifiably curtailed as long as it causes feelings of intolerance, indignation and disgust in the community; it is irrelevant that it may occur in private and/or cause no direct harm to other individuals.[2] The underlying premise is that any right thinking person can discern the shared values and moralities of a society in relation to both private and public activity.[3] Regulation is therefore a result of "moral cohesion". Conservatives maintain that privacy must be respected as far as possible, so minor morals offences can be excluded from the scope of the law.[4] Conservatives, however, only allow individual freedom when its exercise is consistent with the integrity of society.

In relation to broadcasting and sexually explicit depictions, conservatives would permit very little sexual expression. They believe sex is normal and proper only within the context of deep commitment, (preferably marriage) loving concern, restraint and repression of sexual pleasure. Accordingly, they would include "soft core" pornography, nonviolent, non-coercive depictions of consensual sex, and sex education materials within the definition of obscenity. They allege that obscene depictions undermine the sanctity of the traditional family and desensitize their viewers to the point that they lead to callousness and possibly trigger emotionally violent behaviour.[5] Even "neutral", sex-education materials are said to desensitize and habituate the viewer.[6] Part of the harm the conservatives identify from unregulated depictions of sexual activity is the alteration of people's attitudes toward sex and toward each other,[7] and the creatation of a society where loss of privacy,[8] infantile sexuality (masturbation)[9] and promiscuity become the norm.[10] Conservatives believe sexual expression causes a breakdown of feelings of shame associated with sex, which are necessary to protect love and promote self-restraint.[11]

Conservatives also foresee physical harm to others if sexual expression is not controlled. They posit that sexual expression encourages "the pure libidinal principle" which leads to the loss of empathy and mutual identification with others, thereby permitting people to treat each other as objects. Once objectification occurs, an atmosphere is created which facilitates violent acts.[12] It has been suggested that even depictions of sex between a married couple are inappropriate.[13] The apprehension of conservatives that

obscene publications could undermine the structure of society is evident in the following passage:

> It is important to understand that sex radicalism in modern life is the best general index of radicalism in other spheres. The man who publically upholds birth control, the single standard, free love, companionate marriage, easy divorce, and legitimization, is a man prone to play with subversive ideas on private property, to be attracted to criminal syndicalism, to be dubious about the House of Lords, or about the fitness of the republican party to govern, and to question the general efficacy of prayer. When such an individual is attacked under sex censorships it is assumed that no very great tenderness for his rights need be shown.14

Since the first reported successful common law prosecution for publishing an obscene libel occurred in 1727,[15] conservative philosophy has dominated the content of laws and regulations curtailing sexual expression.16 In the 1983 case of Re Luscher and Deputy Minister, Revenue Canada,[17] the trial court judge held that the impugned sexual depictions were obscene even though he acknowledged that they were in no way unnatural or unlawful and were actually a common part of the lives of Canadian men and women.[18]

In summary, conservatives see significant harm to the institutions of marriage, heterosexual relationships and interpersonal relationships wher sexual expression is unregulated. Based on this interpretation of harm, they

would limit by use of the law, non-violent, non-coercive "soft-core", consenting sex; "hard-core" depictions including graphic violence without sexual content; and "neutral" sex education materials in any media form.[19]

b) The Liberal View of Freedom of Expression

Liberal thinkers perceive freedom of the individual as the ultimate value to be protected by freedom of expression. Unlike conservatives, liberals see the social order not as a valued end in itself but as a means to achieve individual freedom and security. It is individual self-expression and self-fulfillment which are seen as ends in themselves, rights which should ideally be free from majoritarian or state direction.

The liberal view of freedom of expression is based on two fundamental assumptions: first, there are no universal truths; and second, speech can never be legitimately curtailed unless measurable harm would directly result from the unregulated expression. The unjustified regulation of speech is said to damage freedom of expression in all its forms. John Stuart Mill is often cited to support the liberal view of law and morality. Mill posited that the only way human beings can gain understanding and knowledge is through a "marketplace of ideas" where everyone can be heard. He thought a frequent reexamination of beliefs and values in face of the most extreme and odious challenges was the only way in which good ideas could multiply and bad ideas die out.[20] In conjunction with the "marketplace of ideas" theory, Mill was of the view that individuals are the best judge of their own interests. Communication which does not permit autonomous decision-making therefore violates

the integrity of the speaker and those to whom the expression is addressed. Mill stated the only justification for limits on expression is harm to others:

> "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[21]

Liberals have interpreted Mill's insistence on harm as requiring direct harm, meaning physical harm or some forms of psychic harm.[22] Obviously direct harm has a very narrow meaning. The classic example of an expression causing direct harm is when someone falsely shouts "fire!" in a crowded theatre.

The requirement of direct harm is also known as the "clear and present danger" test. Applying this requirement to sexual expressions, liberals would argue that unless a "clear and present danger" exists as a result of the sexual expression, legal restrictions cannot be justified. In relation to broadcasting, however, it must be noted that liberals differentiate between public and private sexual expressions allowing that some forms of public sexual expression may be curtailed if they cause psychic offence to others. As broadcasting of sexual representations is generally characterized as a public expression the clear and present danger test should not apply with full rigour. In private, however, this test applies with the result that the sexual

activities of consenting adults is "not the law's business",[23] even if it involves self-infliction of physical or moral damage.

Liberals are generally very critical of the conservative view of harm.[24] Generally, they say if the conservative "harms" were recognized as legitimate, the state could define sexual norms. This is seen as too great an incursion on a matter liberals believe is best left to individual judgment. In addition, enforcing morality by law results in the erosion of public morality, human misery and restrictions of individual freedom.[25] They also disagree with the conservative notion that preservation of society depends upon enforcing a common morality. As liberals believe there are no ascertainable, eternal truths they claim conservatives improperly presuppose generally accepted attitudes toward sex.[26] Liberals say conservatives construct a facade of "correct" sexual behaviour in contemporary society which represents shame, hypocrisy and unnecessary forms of social control.[27]

Liberals also claim that some of the harms cited by conservatives, if they exist at all, are too indirect to justify limits on expression. They argue that the harms cited in relation to sexual expression do not meet the rigours of the "clear and present danger" test. Liberals do not believe pornography causes people to act in certain ways and to the extent that they admit that pornography plays a causal role with respect to people's attitudes and behaviour,[28] they claim that the case for regulation is not made out as pornography is only one of many stimuli prompting behaviour.[29] Liberals also say that no harm results from desensitization of viewers, pornography does not depersonalize sex, and no one is objectified as the expressions represent

sexual fantasies where real people are experiencing pleasure.[30]

While liberals generally see the law as an inappropriate vehicle to deal with most sexual expression, exceptions to the rule are recognized when some measurable, recognized harm can be attributed to the expression or when sexual expressions are broadcast on limited public air waves or channels. Liberals agree that material which depicts real abuse, such as sexual expression involving children and/or sexual expression including real sexual assault, torture or murder, should be censored.[31] They say materials cause direct harm and meet the clear and present danger test because if a legal market exists for this type of expression an incentive is provided for the commission of crimes. A causal relationship is therefore created between distribution of the material and direct harm to individuals. Even if recognizable harm can be identified, liberals warn that only its immediate cause should be addressed by law, not its more remote causes.[32] Legislation must therefore be narrowly drafted and only target the specific harm which meets the clear and present danger test.

In terms of the broadcast media, liberals see the public licencing of limited facilities as analogous to its position on public display of offensive material.[33] The fact that broadcast medium is a limited resource persuades liberals that privileged licensees are not in the same position as ordinary citizens and cannot raise the same arguments regarding control of communications.[34] Where facilities are at a premium, a stronger argument for controls exists although the setting of standards would still raise the basic arguments regarding freedom of expression and harm.[35]

c) The Feminist View of Freedom of Expression

The feminist view of freedom of expression challenges the wisdom of the orthodox liberal and conservative philosophical positions. Although "feminism" may not always be accepted as a discreet philosophy, feminists see equality as the most important value in a free society. Not all feminist writers agree on specific strategies to combat the sexual expression that undermines equality. Some argue for a fundamental restructuring of the economic system,[37] others prefer educational and socialization reforms over any form of state regulation of expression.[38] It appears, however, that the majority of feminists in Canada prefer vigorous use of the law, in conjunction with other strategies, to redress entrenched sexist biases. Although feminists say any interpretation of the relationship between law and morality must take into account the unequal distribution of rights in society.[39] They believe that women do not have the same freedom of expression men do, and if freedom of expression is to be truly protected in Canada, the substantive impact of sexual expression on women's rights must be addressed. If certain forms of sexual expression undermine women's constitutionally guaranteed rights to equality, then feminists believe they are harmful and can be legitimately curtailed.

Feminists distinguish between sexual depictions harmful to equality, labelled "pornography" and merely sexual depictions labelled "erotica". Distinctions are made between pornography and erotica, pornography and sex education and pornography and moral realism. Restrictions are only advocated for sexual expressions which qualify as "pornography". Helen Longino, a feminist philosopher, defines pornography as "[v]erbal or pictorial material

which represents or describes sexual behavior that is degrading and abusive to one or more of the participants in such a way as to endorse the degradation".[40]

Definitions typical of the feminist view of pornography emphasize that the label "pornography" depends upon the context within which sexual expression is presented.[41] Explicit depictions of sex, simple representations of degrading behaviour or descriptions or representations of rape will not be pornographic unless they are advocated, endorsed or designed to sexually stimulate the viewer. Feminists say that such subject matters can be highly moral when the consequences of the acts are explored and the victim's dignity is acknowledged and reaffirmed.[42]

The fundamental distinction between pornography and erotica is central to the feminist viewpoint.[43] The word "erotica" derives from the word "eros" which means passionate love. Gloria Steinem defines erotic sex as "a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice".[44] It is very different from the message of pornography.[45] Just as feminist definitions of pornography share the same emphasis on violence, degradation and inequality, feminist definitions of erotica share the themes of nonviolent caring and equal sexual expression.

Feminists claim that sexual expressions which qualify as pornography damage women's right to equality and physical security. Such expressions harm women's equality because they reinforce the erroneous but widespread idea that women are inferior and entitled to only a limited role within society. When women are set up as objects of male sexual pleasure, frustration and violence,

stereotypes are perpetuated and feminist efforts to improve the rights of women to equality, dignity and freedom from violence are directly undermined.

By making all women its victims, feminists say pornography causes a public, generalized harm. It promotes the degradation of women as a class, results in assaults on institutions, values and practices relating to marriage, privacy, employment and the family, in a way not envisioned by the conservative philosophy. Many women's goals, such as greater participation in public life, and equal pay for work of equal value become much more difficult to achieve when female credibility is assaulted on such a massive scale.[46] Social scientific research over the last fifteen years clearly supports the view that pornography is harmful to women's equality rights and physical security.[47] In their book, Sex, Violence and the Media, Eysenck and Nias undertook an extensive review of the literature on violence and pornography and concluded that:

> [W]here the context is hostile to women, as most pornographic films are, we feel that such films should fall under the category of "incitement to violence towards minority groups" - even though women are not a minority group. Nevertheless such films do constitute a clear case of incitement to maltreat women, downgrade them to a lower status, regard them as mere sex objects, and elevate male machismo to a superior position on the scale of values. Evaluative conditioning, modelling, and desensitization all point to the same conclusion, namely that such presentations have effects on men's attitudes which are detri-

mental to women; in fairness to more than one half of the population, such incitements should be proscribed.[48]

Feminists are critical of both the conservative and liberal philosophies on freedom of sexual expression because neither recognizes pornography as being harmful to women's equality rights. Feminists disagree with the assumptions, application and consequences of the conservative morality both in theory and as it is applied to sexual expression. Although both feminists and conservatives characterize "harm" as extending beyond direct harm to individuals, and Devlin's "disintegration theory"[49] has some relevance to the feminist analysis, the similarities are superficial.

First, the conservative morality creates and advocates an unacceptable sexual ethic, one that asks the law to subordinate sex to procreation and condemn all sexual interation outside marriage. Integral to that notion of morality is the concept of the dependent and virtuous woman, without access to birth control, without access to divorce, without access to a single life or to any of the benefits the law generally confers upon men. In its desire to protect the institution of marriage, the conservative philosophy assumes the subordination of women to men. The conservative values which strive to protect the traditional marriage and family from ammoral influences have little in common with feminist desires for equal treatment and equal access to economic opportunity and independence.

Second, feminists say conservatives, with their blanket emphasis on all sexual interaction are paternalistic and repressive. They fail to distinguish

between the different ways in which sexual interaction can be depicted. They simply condemn it all. Caught in the conservative net are materials dealing with sex education, erotica and moral realism. Under the feminist analysis only something qualifying as "pornography" is considered obscene and worthy of regulation because sex education, erotica and moral realism are necessary for sexual freedom.

Feminists criticize the liberal approach to freedom of expression on three grounds: first, for their gender neutral, universalist application of the individual rights principle; second, for their narrow characterization of "harm"; and third, their reliance on the "marketplace of truth" in an age where it is no longer applicable.

First, feminists criticize the liberal view of freedom of expression because it assumes equality. This assumption has given rise to the view that every time speech is strengthened in one place, it is strengthened in another. For example, liberals say strengthening the speech of the Klu Klux Klan strengthens the speech of Blacks; strengthening the speech of Nazis strengthens the speech of Jews; or strengthening the speech of pornographers strengthens the speech of women.[50] Feminists say this view is fundamentally wrong. Symmetry of expression is impossible where there is an unequal distribution of rights. The substantive inequality of women is perpetuated when neutral principles are applied to speech which undermines the guarantee of equality. The result of the liberal philosophy, in real terms, is the protection of the rights of exploiters at the expense of the rights of women.

The second criticism is related to the first. By characterizing harm as narrowly as they do, liberals actually undermine their own value of individual liberty. Feminists say that individual liberties mean little to those who cannot acquire them because of systemic discrimination. Unless a social environment exists which allows all individuals to exercise individual liberty, individual liberty will never be achieved. By ignoring the real social harm caused by pornography, liberals are unable to address these fundamental concerns.

The third criticism of liberal philosophy is the applicability of Mill's "marketplace of truth theory". Mill posited that the only way that truth can emerge is through a form of natural selection in a "free market" of ideas: if all ideas are allowed expression, good ideas will multiply and bad ideas will die out. The application of Mill's theory to pornography is that if the messages contained in it are bad, they will die out and be replaced by good ones. Presumably, the view that women are equal to men, and that children have dignity and deserve to be treated with respect, will prevail. The messages in pornography that women and children are sex objects, available to be violated, subjugated and coerced at the will of men, will disappear. In response, feminists point to the reality of the modern marketplace. Pornographic images proliferate virtually everywhere[51] and statistics of rape,[52] wife battering[53] and sexual abuse of children[54] indicate that egalitarian ideals are far from being universally accepted. Even though liberals agree that the broadcast medium, because of its monopoly over a limited resource may legitimately be subject to greater restrictions than other forms of communication, feminists argue that freedom of expression in broadcasting requires more than mere limits

and may entail the obligation to present positive images of historically and systemically groups.[55]

B. The Criminal Law of Obscenity

We will now review the law of obscenity as a case study of how these three philosophies affect the law, both in its enactment and judicial interpretation. It is our thesis that since the obscenity laws were enacted there has been a gradual movement away from the conservative philosophy. At first this movement was towards the liberal philosophy, but now, there is some indication that the movement is away from the liberal approach to an acceptance of the feminist philosophy. As we study the obscenity provisions in the Criminal Code we will see that the rationale of these sections is based on the conservative philosophy. Subsequent judicial interpretation of the obscenity sections, by adopting and defining a community standards test, shows an acceptance of certain aspects of liberal thinking on the topic of freedom of sexual expression. Lately, and increasingly, however, the judicially defined community standards test has taken the feminist emphasis on equality rights into account. Many recent government reports also support the trend towards an increasingly feminist approach to freedom of expression. The marked trend towards a feminist analysis is perfectly consistent with the Canadian Charter of Rights and Freedoms which grants a wide protection to equality rights and a special status to gender equality. This trend will have effects on all arguments which use the harm justification for restricting free expression.

We also review the Broadcasting Act to examine how it defines values and harms. As the Broadcasting Act has been amended while this shift from conservative to liberal to feminist values occurred, it is not surprising that the legislation itself contains examples of each philosophy. As the Broadcasting Act is not subject to the same intensive and extensive judicial

review as the Criminal Code obscenity provisions, there is little likelihood of a judicially recognized standard which would incorporate the feminist's emphasis on equality. Legislative action is therefore required to completely and consistently ensure that the protection of equality rights underlies restrictions on free expression.

a) The Conservative Influence and the Criminal Code Obscenity Provisions

Criminal legislation prohibiting certain forms of sexual expression was passed for the first time in Canada in 1892.[56] The relevant section in the Criminal Code simply stated it was a crime to knowingly and without lawful excuse publicly see obscene material or expose obscene material for public sale or to public view. No definition as to what would constitute obscene material was provided in the legislation. When cases came before the courts, Canadian judges adopted a definition developed in the English jurisprudence which said a publication was obscene when:

> "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall.[57]

The policy underlying this definition was paternalistic and moralistic. The values protected were conservative ones. The fundamental assumption underlying the words is that certain members of society required protection from immoral, and therefore harmful influences. It was assumed by the courts that something found to be obscene must deprave and corrupt the people who are exposed to it.[58]

This definition remained the law in Canada until 1959 when Parliament amended the Criminal Code to statutorily define "obscenity"[59] as:

> . . . any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence . . .[60]

This definition is the current law and it generally provides the standard for all criminal offences dealing with obscenity.[61] It requires the undue exploitation of sex. Violence itself could not be obscene. This reading of this section is known as the "sex plus" requirement and its effect was to limit the reach of the obscenity law to sexual depictions.[62] The definition of obscenity includes the portrayal of certain forms of violence only if accompanied by the undue exploitation of sex.

By prohibiting the "undue exploitation of sex", the section implicitly condones the "due" exploitation of sex. Since women are in almost all cases the subject matter of depictions of sexual exploitation for the entertainment of men, the legislation has the effect of legitimizing the devaluation of women as human beings. The grammatical construction of the section also leads to the conclusion that the "due" exploitation of sex, even if it is combined with crime, horror, cruelty and violence, is not criminal. This endorsement of sexist values and violence is unacceptable to feminists.

Obscenity offences created by the Criminal Code are the making, printing, publishing, distributing or circulating of obscene material.[63] Selling and exposing obscene material to public view or possession for such a purpose knowingly, without lawful justification or excuse is also an offence. The two offences distinguish between producers and distributors of obscenity and sellers of obscenity. A seller must know what he is selling is obscene before he can be convicted, but a producer or distributor can be convicted without this knowledge. Under the Criminal Code a broadcaster can be liable as a producer.[64]

"Undue exploitation of sex" is the cornerstone of the definition, and it reflects conservative moral values in at least three ways: first, the words of s. 159(8) presuppose a common sexual ethic which is exceeded by legally obscene material; second, obscenity offences are described in the Code as "offences against morals"; and third the etymology of the word "obscenity" addresses only offensiveness and sexual arousal and not the harms feminists or liberals would recognize.

It is interesting to note the extent to which these sections are dictates of conservative morality by mentioning that s. 159(2)(c) requires the repression of information regarding abortion or miscarriage. This section supports the view that non-procreative sex is immoral. It is also worthy of note that until 1969 it was a criminal offence, under this section, to advertise birth control devices. Feminists would strongly question the propriety of using the law to limit free expression about birth control and reproduction because prohibiting the dissemination of this kind of information

adversely affects the rights of women to self-determination regarding their actual and potential maternity. These Criminal Code provisions contain examples of the conservative philosophy.

b) The Introduction of Liberal Ideas and the Judicial Interpretation of Obscenity Laws

We previously noted that the statutory offence against criminally obscene material protects conservative values by focussing primarily on the "undue exploitation" of sex. The judicial interpretation of "undue" became known as the "community standards test".[65] It is apparent from a review of the case law that the term "undue exploitation of sex," at least until 1983, was interpreted as the degree of explicitness in a sexual depiction: the section's additional categories of sex combined with cruelty, violence, horror and crime were largely ignored by the courts. Certainly the impact of sexual depictions on equality was not analyzed or commented upon. It is also apparent from a review of how the courts fashioned a community standards test that, in the last twenty years, there has been a shift from a conservative to a liberal approach. This resulted in greater permissiveness both in court decisions and in the application of the community standards test. In the last two years, another shift toward feminist thinking can be discerned.

For example, the liberal view was emphasized in R. v. Coles Co., a case involving the book, Fanny Hill, Memoirs of a Woman of Pleasure, which described the activities of a prostitute.[66] Chief Justice Porter stated that the freedom to describe human life with complete candour is fundamental to the

progress of a free society and should not be curtailed unless "extreme circumstances" exist. The majority of the Court was of the view that the book had historical and literary merit and lacked the degree of pruriency required to render it obscene.[67]

c) The Growing Feminist Influence and the Canadian Charter of Rights and Freedoms

Increasingly it is recognized that something other than explicit sex may be obscene.[68] In recent lower court decisions, more attention has been directed toward depictions that combine sex and violence. In R. v. McCormick,[69] where homosexual acts were depicted in photographs showing juvenile boys engaged in fellatio and sadomasochistic activities, the Court said that the depictions combined sex with cruelty and violence and were thus obscene.

Degradation and dehumanization in the context of sexual depictions were specifically discussed for the first time in the case of R. v. Doug Rankine Co.[70] Judge Borins of the Ontario County Court held that videotapes for private home use were obscene when they consisted [s]ubstantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed . . .".[71] The Rankine case represents the first time a Canadian court examined obscene depictions specifically from the point of view of the victims of the sexual abuse, rather than of the sensibilities

of the observers, thereby opening the door for an examination of the effects of obscene depictions on gender equality.

In R. v. Ramsingh,[72] another case involving home video cassettes, the Manitoba Court of Queen's Bench appears to have taken Mr. Justice Borins' analysis one step further. While Borins J. would require that sex and violence be accompanied by degradation and dehumanization in order to find depictions obscene, Ferg J. in Ramsingh suggested that degradation and dehumanization alone could be obscene. He commented:

> As well, I think that where violence is portrayed with sex, or where there are people, particularly women, subjected to any thing which degrades or dehumanizes them, the community standard is exceeded, even when the viewing may occur in one's private home.[73] (emphasis added)

In a recent landmark decision in Alberta,[74] the feminist analysis of harm was adopted. The general principles set forth in Rankine[75] and Ramsingh[76] were applied in the case, but several new approaches were taken as well. In his analysis of the meaning of "undue exploitation of sex", Shannon J. of the Alberta Court of Queen's Bench distinguished three different types of sexually explicit material: violent, non-violent but degrading and dehumanizing, and erotica. He described the three categories in detail, providing examples of each, and held that the Canadian community will tolerate erotica, but not material falling into the other two categories. Unlike Borins J. in Rankine, Shannon J. was of the opinion that explicit sex per se is not obscene. He said

that "it is the message that counts, not the degree of explicitness".[77] By emphasizing "the message", the Court is saying that the context of the sexual depictions is the paramount consideration.

Mr. Justice Shannon's decision provided the courts with the opportunity of assessing the social harm identified by feminists as being caused by pornography. In dealing with the Charter argument that subsection 159(8) of the Criminal Code[78] is an unwarranted infringement on freedom of expression, Shannon J. held[79] that the obscenity section came within the saving provision of section 1 of the Charter because of the social harm that results from viewing obscenity. He held that sexually violent or degrading and dehumanizing pornography causes social harm to women. He accepted evidence that men repeatedly exposed to such depictions become calloused towards women and are less receptive to their claims for equality. By relying on social science evidence and by identifying social harm as a justification for infringements of subsection 2(b) of the Charter, Shannon J. added a new dimension to the type of evidence usually heard in obscenity cases.

This development is very much in line with the view that courts should, in interpreting the Charter, consider the social, economic and political context of Canadian society.[80] The British Columbia Court of Appeal in R. v. Red Hot Video[81] adopted the equality justification for limiting obscene expression and said that in addition to the s. 1 limitation in the Charter, s. 28 and s. 15 of the Charter, which guarantee women's equality with men, are in themselves limitations on s. 2 fundamental freedoms like freedom of expression.[82] The Supreme Court of Canada in the 1985 case of Towne Cinema Theatres Ltd. v. R.,[83]

for the first time, discussed the harm caused by obscenity on terms of equality principles. Justice Wilson stated at p. 29:

> "There is nothing wrong on the treatment of sex per se but there may be something wrong in the manner of its treatment. It may be presented brutally, salaciously and in a degrading manner, and would therefore be dehumanizing and intolerable not only to the individuals or groups who are victimized by it but to society at large. On the other hand, it may be presented in a way which harms no one, in that it depicts nothing more than non-violent sexual activity in a manner which neither degrades nor dehumanizes any particular individual or groups. It is this line between the mere portrayal of human sexual acts and the dehumanization of people that must be reflected in the definition of "undueness".

These cases illustrate how the courts have redefined the concept of obscenity according to the feminist model in relation to both the Criminal Code and the Canadian Charter of Rights and Freedoms.

This judicial tendency of emphasizing the context of representations and their effect on equality rights is also found in numerous recent government reports and is reinforced by psychological research.[84] The Report of the House of Commons Standing Committee on Justice and Legal Affairs concluded that pornography "promotes values and behaviour which are unacceptable in a society

committed to egalitarian, consensual, mutual and non-violent human relationships".[85] Similarly, the Special Committee on Pornography and Prostitution (The Fraser Committee) adopted the statement of the Justice and Legal Affairs Committee, adding:

> "In the view of the Committee, there are magazines, films and videos produced solely for the purpose of entertainment where depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.[86]

There has therefore been a marked change in emphasis in discerning whether a particular harm justifies restriction on free expression. The emphasis has shifted from the conservative and liberal philosophies to the contextual and egalitarian underpinnings of the feminist philosophy, reflecting a growing societal concern over social inequalities.

C. The Broadcasting Act and Regulations

In the last section we reviewed the law of obscenity as a case study of how the conservative, liberal and feminist philosophies are reflected in statutory provisions and judicial standards. Those obscenity provisions bind all broadcasters. Although s. 3 of the Broadcasting Act underlines the importance of freedom of expression and clearly establishes that its policy is to give the power and responsibility of program content to licensees, it incorporates the Criminal Code obscenity provisions into the Broadcasting Act in the following way:

> 3(c) All persons licenced to carry on broadcasting undertakings have a responsibility for programs they broadcast, but the right of freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations is unquestioned.

Restrictions on programming content may emanate either from laws of general application, like the Criminal Code or the Charter from particular laws like the Broadcasting Act.

In this section we review how sexual expression is regulated under the Broadcasting Act by examining the philosophy current provisions embody and by discussing three particular freedom of expression issues raised by the broadcasting regulations.[87] As the Act's provisions were introduced at different times and were motivated by varied concerns, the Act and its regulations are not nearly as clear as the Criminal Code in stating the values it seeks to protect and the harms it seeks to avoid. Generalization is also made difficult as radio, television and pay television are subject to

different regulations concerning program content. This opens up the possibility that each medium of communication could have a different philosophy or philosophies underlying its regulations.

a) The Philosophy of the Broadcasting Act

In 1984, the CRTC amended the Broadcasting Regulations to address abusive broadcasting in radio, television and pay television, thereby adding further restrictions on freedom of expression. The regulation prohibits:

> "any abusive comment, which, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion . . . sex, age, or mental or physical disability.[88]

The television broadcasting regulations have the same prohibitions but add the protection of ". . . abusive pictorial representation."[89] The old regulations were much narrower in scope, merely prohibiting abusive comments or pictorial representations on any race, religion or creed.[90] By expanding the categories of protection beyond race, religion and creed and prohibiting abusive broadcasting, the CRTC placed a higher value on gender equality rights than on freedom of expression. This section resembles a prohibition against hate propaganda consistent with the feminist view of harm.

In addition to the requirements of s. 3, and the abusive broadcasting regulation, radio and conventional television are governed by other regulations which appear to protect conservative moral values more than any

other. Regulations for AM and FM radio licensees provide that they may not broadcast anything contrary to law or any obscene, indecent or profane language[91] or pictorial representation,[92] or any program on the subject of birth control or venereal diseases unless it is presented in a manner appropriate to the medium of broadcasting.[93]

Pay television regulations are not as wide. They do not include the "anything contrary to law" and "any obscene, indecent or profane language or pictorial representation" limitations which apply to radio and conventional television. Other than limitations on abusive broadcasting[94] the only limits on sexual expression for pay television licensees is found in Regulation 7 which requires suitable warnings in respect of programs inappropriate for children.[95] Regulation 7 states:

> "7. Where a program to be distributed by a licensee is not suitable for an audience other than an adult audience by reason of its subject matter or treatment thereof, or any characteristic thereof, including its depiction of violence, nudity or explicit sexual conduct, or by reason of coarse language or other content likely to be offensive to some viewers, the licensee shall so advise by providing an appropriate indication thereof at the beginning, and in all promotion of the programming."

In effect, this regulation permits pay television programming to include violence, nudity, explicit sexual conduct and coarse language as long as warnings are given. It is clear from this regulation that the strict controls

that apply to radio and conventional television are not applied to pay television. By dropping the "anything contrary to law" limitation in s. 3, the regulations effectively permit the broadcast of obscene material on pay television, without infringing the Broadcasting Act. A broadcaster of obscene material on pay television would only be liable under the criminal legislation because its conduct would not be an offence under the Broadcasting Act.

The underlying policy for pay television appears to be a liberal one. Liberals believe that when viewers are subscribers who choose to purchase a communications service, there should be a greater reluctance to infringe on individual freedom than in the situation where a consumer is receiving communications through the standard air waves available to everyone.

Pay television licensees self-regulate to ensure compliance with Regulation 7. They developed standards and practices which state that pay television licensees "have a responsibility to ensure that the programming they provide is of high quality and meets general community standards within the context of a discretionary service." The basis of their discretion is stated as follows:

> The discretion of programming personnel will be exercised responsibly and in good taste. In particular, no material will be selected that is:
>
> (a) contrary to law, including the Broadcasting Act and CRTC Regulations; or
>
> (b) offensive to general community standards.

> "Community standards" will necessarily change over time and therefore will be subject to continuing review and evaluation. Pay television licensees will not select programming that would go beyond an "R-rating", or its equivalent.[96]

There are also provisions which require pay television licensees to "exercise particular care" during family viewing times. The standards and practices require licensees to schedule sexually explicit and/or violent material in the late evening or early morning hours only. The guidelines also provide for review by the CRTC after one year for "adequacy".

It appears that the underlying policies of the Broadcasting Act and Regulations are mixed. Recognition that pornography can amount to a form of hate propaganda is a feminist view; regulation controlling the indecent and the profane have a conservative base and lack of regulation to control pay television is a liberal value.

The mixed policies and regulations dealing with different broadcasting services give rise to two freedom of expression issues. First, the words "indecent" and "profane" in addition to the word "obscenity" in the list of prohibited content, seem to put more onerous restrictions on radio and television broadcasting than the Criminal Code obscenity laws put on other forms of media. Even if obscene depictions are not protected by the Charter, the constitutionality of the "profane" and "indecent" limits could be challenged unless there is some legal justification for them that meets the

Charter criteria for limitations in s. 1. Second, the technology of cable broadcasting and its method of delivery is different than that of over-the-air broadcasting. Its delivery system does not make use of publicly owned air waves and it is a purchased service. An argument could be made that cable broadcasting is more akin to print media and should be governed only by "obscenity" standards, not the "indecent" and "profane" standard. These arguments are explored in the next section.

b) The Broadcasting Act Prohibition Against Obscene, Profane and Indecent Images and the Print Media Standard

The words of Regulations 5 and 6 say that no station or network shall broadcast any obscene, indecent or profane language or pictorial representation. These words are broader than the Criminal Code limitations on obscene speech as the additional words, "profane" and "indecent" do not appear in the Criminal Code definition of obscenity. The addition of these words suggests that the Broadcasting Act prohibits language and pictorial representations that are something other than obscene. We have seen that the prohibition against obscenity has been upheld as a reasonable limitation on free expression.[97] This justification would also support the Broadcasting Act regulation against "obscene" representations but as the regulations go farther and prohibit the "profane" and "indecent", a separate justification for these added standards is required. These parts of the regulation must also qualify as reasonable limits prescribed by law which are demonstrably justified in a free and democratic society.

A review of the constitutionality of limits on freedom of expression must take into account that the unique characteristics of the broadcasting medium may affect how the concept of harm is defined. For example, it has been expressly recognized in the United States, and is implicitly recognized in Canada, that the principles of constitutional review for broadcasting are different than those for the print media. In 1978 in the landmark Pacifica case, the American Court found that regulations against "indecent" programs on the broadcast media did not offend the First Amendment even though the "indecent" programs fell short of the criminal law standard for "obscene" programs.[98] The Pacifica case arose from the early afternoon radio broadcast of a record which used "seven dirty words", judged by the F.C.C. to be "indecent" and prohibited under the pertinent statutory provision. The radio station challenged the constitutionality of the F.C.C. decision, arguing it offended First Amendment protection of free speech. The F.C.C. defined "indecency" as "language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience".[100]

In a narrow five to four decision, the United States Supreme Court upheld the F.C.C. decision, thereby upholding the F.C.C. definition of "indecency" for broadcast purposes. The Court however, limited its decision to breaches of the regulation that occur during "times of the day when there is a reasonable risk that children may be in the audience". In a footnote, the Court pointed out that broadcasting the same program at a later hour when children were less likely to be listening, "is an issue neither the Commission

nor this Court has decided."[101] The Supreme Court noted that of all forms of communication, broadcasting has received the most limited constitutional protection, emphasizing that broadcasting involves the privacy of the home, where an individual's "right to be left alone plainly outweighs the First Amendment rights of an intruder". The Court also noted that prior warnings cannot completely protect the listener or viewer from unexpected program content. One can conclude, therefore, that in the United States, there are two types of broadcast programming that may be prohibited: (1) that which is legally obscene as defined by the criminal standard, and (2) that which is not obscene but nevertheless is indecent under the Pacifica standard.

The Court rationalized their decision, which allowed tighter controls for broadcasting than the press, by reference to three characteristics of the broadcast medium: the natural scarcity of the radio spectrum; the unique pervasiveness of broadcasting in the lives of citizens as it confronts citizens in the privacy of their homes; and the fact that broadcasting is particularly available to children.[99] The U.S. Supreme Court thought the characteristics of scarcity, pervasiveness, and availability to children were relevant when they were called upon to uphold limitations on a broadcaster's freedom of expression.

In Canada if the words in Regulations 5(1)(c) and 6(1)(c) were challenged under the Charter, the same justifications of scarcity, pervasiveness and availability to children would be argued. As these characteristics apply equally to Canadian broadcasting, a Canadian Court may accept them as satisfying the s. 1 justification requirement that the

limitation be reasonable and demonstrably justified in a free and democratic society. It may be more difficult however, to show that our regulations are "prescribed by law" as required by s. 1. because in the Broadcasting Act or Regulations do not define the words "indecent" and "profane". In a recent case the Federal Court of Appeal found the undefined words "immoral and indecent" to be unconstitutional because they were too vague to be "prescribed by law."[102] If the Broadcasting Act, Regulations 5(1)(c) and 6(1)(c) are challenged, they may be struck down for vagueness. Current case law would require a clear definition of these operative terms to satisfy the requirements of s. 1..[103]

c) Standards for Cable Television

Obscene programming as defined by s. 159(8) of the Criminal Code is not constitutionally protected by the Charter[104] and can clearly be prohibited from cable television programming. Whether indecent and profane programming may also be prohibited from cable programming has not yet been definitively settled . In the United States, courts have differed on the question.[105] Traditionally, the Courts upheld different standards for broadcast media for the reason of "natural scarcity" of the radio spectrum.[106] Later, the Pacifica[107] case added the pervasiveness and availability to children as additional reasons to support different standards.

In 1981 however, a distinction was made for cable television. The United States District Court for Utah held that a state statute prohibiting the broadcast of "indecent" material on cable television could not stand as it offended constitutional protections of free speech. The statute in question

prohibited the distribution by cable of "any pornographic or indecent material to its subscribers." The court said the standard applicable to cable television broadcasting was the same standard applicable to print media.[108] "Pornographic" was defined by the criminal standard[109] and "indecent" included sexual activity and nudity not amounting to obscenity. In another case which came to the same conclusion, the judge distinguished the Pacifica decision on the grounds that cable transmissions were different from over-the air broadcasting. Unlike broadcast reception, cable subscribers must contract for service, signals are transmitted by privately-owned wires rather than publicly-owned air waves, and the cable user must pay a regular fee and, if offended by program offerings, may cancel service. The Court concluded that a different, lower standard of constitutional review applies to cable programming, not the Pacifica standard which applies to broadcasting.[110]

In 1977, the District of Columbia Circuit Court of Appeal[111] considered the permissible scope of F.C.C. regulation of cable television programming and subscription broadcast programming. The Court also distinguished between the validity of the restrictions applicable to cable and the restrictions applicable to subscription broadcast services because cable does not use the radio spectrum. The rationale based on the scarcity of airwaves, upon which the constitutional treatment of broadcasting is based, was not applicable. The court concluded that even though evidence indicated that cable is a natural economic monopoly:

> "scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited

> government intrusion into the First Amendment rights of the conventional press, and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.[112]

In other cases, however, it has been held that the natural economic monopoly of cable services are analogous to the scarcity of the airwaves rationale and this monopoly justifies regulation what might otherwise be unconstitutional infringements on freedom of expression.[113] The Court in the Community Communications case said:

> If when faced with a request for a licence from a cable operator, government reasonably anticipates the kind of medium scarcity we have discussed, it must be permitted to deal with the effects of the scarcity that may attend the use of the licence it is is about it issue. That is, government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest. The conclusion that a natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operations does not mean that the full panoply of principles governing the regulation of wireless operators necessarily applies to cable operators.[114]

Another appellate court[115] held there were enough differences between cable television and the print media to allow more government regulation of cable:

> The Supreme Court has interpreted the First Amendment to allow more government regulation of television than of

> theaters, movies, books, newspapers, or open-air addresses. True, the double standard was developed with respect to broadcast rather than cable television and the cases articulating the standard emphasize the need to regulate broadcast frequencies in order to prevent interference, a problem that does not arise with cable television. . . . Moreover, the apparent natural monopoly characteristics of cable television provide, as we have seen an argument for regulation of entry. . . . Another explanation of the different treatment under the First Amendment between television and other media is the universal access to the home that television enjoys and a resulting felt need to protect children. This consideration is independent of whether the television signal comes into the home over the air or through a co-axial cable.
>
> Probably there are enough differences between cable television and the non-television media to allow more government regulation of the former. (Footnotes omitted)

As a review of these cases indicate there is significant disagreement among the American courts regarding what qualifies as constitutionally appropriate regulation of cable program content. Two district courts have held that cable programs only have to meet the same standard as the print media whereas several other courts have viewed the freedom of expression limitation on cable to allow for more regulation that that permissible on the print media.

In Canada, the question of different standards has never arisen. There have, however, been challenges to the jurisdictional authority of the CRTC to make regulations controlling cable television systems. In a series of cases starting with Re Public Utilities Commission v. Victoria Cablevision Ltd.,[116] the difference between over-the-air broadcasting and cable broadcasting

technology was used as a basis for arguing that provinces rather than the federal government should have jurisdiction to make regulations. The province argued that where the bulk of the cable broadcasting undertaking is an elaborate network of co-axial cables that travel over municipal rights of way and connect the receiving antenna to subscriber's homes, it is quite distinct from radio and television and is essentially a local undertaking. The Supreme Court of Canada settled the matter in 1977,[117] essentially adopting the reasoning of Viscount Dunedine in the Radio Reference[118] case where it was decided that the transmitting end of communication cannot be separated from the receiving end. Viscount Dunedine stated:

> The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and receiving instrument. In their Lordships' opinion, this cannot be done. Once it is conceded, as it must be, . . . that the transmitting instrument must be so to speak, under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and receiver. The receiver is indeed useless without a transmitter and can be reduced to a non-entity if the transmitter closes. The system cannot be divided into two parts, one independent of the other.[119]

It would seem then, that the federal power vested in the CRTC to set standards for obscene programming would pre-empt any provincial power to set standards for cable television. However, analysis of the constitutional boundaries of the regulation of pornography on cable television involves a further inquiry into the similarities and differences between the broadcasting and cable

media. In some respects, cable transmissions are quite different than broadcasting transmission. The major distinction is that cable does not utilize the radio frequency spectrum the broadcasting media utilizes and consequently, the "spectrum scarcity" argument which is central to the appropriate standards of judicial review, cannot apply. Furthermore, it can be argued that cable does not "invade the home" in the same way broadcasting does. Customers must subscribe and pay a fee in order to obtain the service. It has also been argued that the "availability to children" aspect is also different because technology is available to "lock out" channels that carry offensive material through the use of "lock boxes".

On the other hand, strong similarities with the broadcasting media exist. Cable television carries broadcast television channels and other cable programming which is very similar to broadcast programming. It is also true that whether a television set is connected to cable or broadcast reception, the same concerns arise regarding the pervasiveness of programming and its access to children. In Canada, some communities are served only by cable so free choice is limited to some and the scarcity rationale applies to cable, albeit not in a physical form. It should not matter if the scarcity is physical or economic if its effect is to remove the means to express ideas from all but a select few. Lock boxes, which enable parents to control their childrens' access to television viewing, are not widely available in Canada and the utility of lock boxes can also be questioned if objectionable programming is not confined to specific channels and times. Courts may be convinced by these similarities and impose the same standard of constitutional review over cable programs as they do for conventionally broadcast ones.

d) Pay Television Standards

Pay television regulations exclude the Broadcasting Act limitation on obscene, indecent or profane language or pictorial images and only a warning is required. The argument that if a viewer finds a program to be offensive or indecent she or he can simply turn it off, is often used by proponents of the pay television standard. Opponents would say this argument is the same as saying the remedy for an assault is to run away after the first blow.[120]

The policy of having less stringent rules for pay television does not adequately address the following concerns: First, even though pay television does not make use of the broadcast spectrum, cable licenses are not readily available to all those who may wish to have them. Consequently, more rather than less attention must be paid to the public interest. Second, broadcast media have a unique accessibility to children, who in many cases are unsupervised, cannot read the warning, or are attracted by its very presence. Third, as television sets are in the homes, privacy rights can support an argument that viewers should be "free from" offensive or indecent depictions; and fourth, unconsenting viewers may tune in a channel without having read the warning that offensive material is being shown. In addition to these arguments, a case could be made out that the CRTC, by allowing sex and violence on pay television, would be failing to meet its constitutional responsibilities under s. 15 and s. 28 of the Charter.[121] If the public interest in protecting egalitarian ideals is the essence of speech limitations on sexual expression, harm to a constitutionally guaranteed right should be no less serious because it is paid for by subscription.

D. Hate Propaganda

The legal regulation of hate propaganda is justified on the basis that hate propaganda harms the group against which it is targeted and the egalitarian underpinnings of our democratic society. As a concept, hate propaganda is best viewed as being at the extremity of a continuum of possibilities of expression, with the most damaging representations at one end and positive representations at the other. The production and distribution of hate propaganda is presently controlled by the criminal law, the civil law and the regulations under the Broadcasting Act. Each of these laws has a different purpose and a different definition of hate propaganda but all share the same justification for restricting this type of expression; namely, the prevention of harm.

These various laws constitute a prima facie infringement on the right to freedom of expression enshrined in s. 2 of the Charter. In order for hate propaganda laws to withstand a constitutional challenge, it will be necessary for the Crown to demonstrate that the laws are reasonable, prescribed by law and are demonstrably justified in a free and democratic society. The judiciary, in turn, must balance the limits on individual rights imposed by hate propaganda laws against the interests of society. In the course of a constitutional challenge, arguments will address the desirability and utility of using the criminal or civil law as a tool to curtail expression promoting hatred of specified groups.

The legal regulation of hate propaganda is of fairly recent origin and has been accomplished despite the vociferous objections of those espousing the

liberal philosophy. Legislators and commissions asked to review the law on this subject have increasingly subscribed to the view that this kind of expression damages the equality rights and dignity of the targeted groups and therefore undermines the egalitarian underpinnings of our democratic society. In this respect, like the tendency noted in the section on obscenity, hate propaganda laws have rejected the liberal philosophy in favour of the feminist emphasis on equality. The many committees which studied this topic have all recognized the social harms of hate propaganda and have recommended its restriction in ever widening terms. In this section these laws are described and discussed. Arguments for and against hate propaganda laws are canvassed and recommendations of numerous commissions which have investigated the subject are discussed. Justifications for limiting this form of expression are examined.

a) The Law

Various types of hate propaganda are addressed in the Criminal Code, rights legislation, group defamation statutes and the Broadcasting Act and Regulations.

The Criminal Code identifies two offences: false news and hate propaganda. The offence of false news requires the willful publication of a false statement which causes or is likely to cause injury,[122] and the hate propaganda provision requires either the promotion of genocide against an identifiable group;[123] or public statements inciting hatred against an identifiable group which are likely to lead to a breach of the peace.[124] Specific defences are available to a charge of inciting hatred against an identifiable group[125] under subsection 281.2(2) C.C. It is interesting to note that the Criminal

Code does not include "sex" as an identifiable group thereby excluding pornography for consideration as a form of hate propaganda.

These sections were enacted after a lengthy investigation by a federally appointed Special Committee on Hate Propaganda in 1965. The Committee was formed because of the widespread distribution of hate literature in Canada in the early and mid-1960's, targeted primarily at Blacks and Jews. Professor Maxwell Cohen, Chairman of the Committee, stated the Committee's rationale for proposing hate propaganda amendments to the Criminal Code in terms of harm to the community and to individuals.[126]

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal crossfire that goes beyond legitimate debate.
>
> An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that

> conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.

Human Rights legislation has a different policy base than the Criminal Code. Rather than punishment and deterrence, the policy goals of human rights legislation are directed towards equality, non-discrimination and education of the public.[127] Human Rights legislation addressing hate propaganda exists in three jurisdictions at the present time. The Canadian Human Rights Act,[128] the Manitoba Human Rights Act[129] and the Saskatchewan Human Rights Code[130] extend protection, in different degrees, to identifiable groups from hate propaganda.131 The Canadian Human Rights Act specifically protects individuals or groups or class of individuals on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The Manitoba Human Rights Act and the Saskatchewan Human Rights Code provide much more extensive protection from hate propaganda than the Canadian Human Rights Act does.

The Civil Rights Protection Act, 1981[132] of British Columbia and the Manitoba Defamation Act[133] provide a different procedural approach for hate propaganda complainants than the Human Rights Codes mentioned above. Unlike the Canadian, Manitoba or Saskatchewan human rights legislation, the B.C. and Manitoba Acts confer a cause of action on individuals who are members of identifiable groups attacked by hate propaganda. Unlike the human rights approach, the individual suing has control over the action. A court can award

damages, impose fines, and allow injunctions in appropriate cases. Protection under group defamation statutes does not, however, include "sex" as a protected category and therefore would not address pornography.

The hate propaganda provisions in the Criminal Code are incorporated by reference into the Broadcasting Act in s. 3(c). Recent amendments to regulations under the Broadcasting Act[134] also address hate propaganda. The regulations forbid an AM or FM licensee to broadcast "any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[135] Similar regulations for television and pay television have been passed, which extend to abusive pictorial representation.[136]

The empowering section for these regulations is s. 3(d) of the Broadcasting Act which reads:

> s. 3 It is hereby declared that . . .
>
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views or matters of public concern, and the programming provided by such broadcaster should be of high standard, using predominantly Canadian creative and other resources."

The Canadian Radio and Telecommunications Commission enforces the regulations and can control program content to a limited degree through its licencing power. It has the power to issue and renew broadcasting licences and may impose conditions of licence.[137] The Commission or the Crown can also deal with program content through the actions contained in the Broadcasting Act and in the Criminal Code hate propaganda sections. Sections 281.1, 281.2, and 177 of the Code contain provisions that could result in a prosecution being brought against a radio or television broadcaster, but it is more likely that criminal proceedings would be taken under s. 29 of the Broadcasting Act which allows for fines for breaches of regulations of $25,000 for first offences and $50,000 for subsequent offences.

b) Arguments Against Legislative Control of Hate Propaganda

Opponents of hate propaganda laws argue against legal regulations on the grounds of principle, proof and pragmatism: they allege anti-hate laws would offend the principle of free expression; there is insufficient proof of harm to satisfy the clear and present danger test; and in practical terms there is no reason why hate propaganda should be singled out for legal controls. Liberals say the use of the law to curtail dissemination of hate propaganda is impractical, illdefined, discriminatory, and offensive to their fundamental philosophies about "harm" and "truth". They also argue that there may be some benefit to society by allowing hate propaganda because of its cathartic effect. Liberals are very opposed to any extension of the criminal or civil laws of hate propaganda, either to include the category of "sex" as a

protected category or to make the publication or dissemination of hatred an offence without requiring specific intent to promote hatred.

i) Principle

The centrality of free speech to a democratic society requires that all views must be heard. Liberals believe that changes in social, economic, political and religious values have come about because of a "marketplace of ideas" where conflicting views vie for the attention and affection of citizen consumers.[138] and that often insights and revelation often are found in pernicious speech.[139] Liberals say that in a healthy and selfconfident society citizens can and must be trusted and legislatures should not attempt to enshrine political, moral or social good taste in law. Political freedom is not divisible; especially not divisible into "dangerous" and "nondangerous" categories much less into "offensive" and "non-offensive" categories. The only jurisdiction for any interference with free speech is to preserve the very fabric of society against a "clear and present danger".

ii) Proof of Harm

Liberals argue that imposing hate propaganda laws was and is an over-reaction to a minimal problem and that any harm which can be shown to result from hate propaganda does not satisfy the rigours of the clear and present danger test.[140] They point to the findings of the Special Committee on Hate Propaganda where it is stated:

> "The amount of hate propaganda presently being disseminated and its measurable effects probably are not sufficient to justify a description of the problem as one of crisis or near crisis proportions.[141]

These findings are taken as evidence that there is no proof of a clear and present danger in Canada from hate propagandists. Liberals reason that since there is no immediate danger, the rationale for laws controlling this speech must be apprehended harm.

Liberals say it is wrong to pass laws inhibiting speech in anticipation of future harm. They say if the Canadian public has withstood attempts of hate-mongers to spread hatred in the past, they should be trusted to do so in the future. If laws are passed on the premise that something "just might happen", the door is opened for serious abuse of freedom of expression in future laws. Liberals maintain that the objective test of "clear and present danger" rather than the subjective test of the apprehensiveness of some parts of the community, is the best method of protecting liberty for all.[142]

iii) Pragmatism

Liberals offer five objections to the legal regulation of hate propaganda based on pragmatic concerns. First, they claim hate propaganda laws are impractical because they fail to address the real problem of ethnocentrism. Liberals point to history to show that hostility on the basis of group membership has always existed and runs very deep in human nature and society. The

communication networks of group hatred exist in primary groups such as the family, neighbourhood and social groups. Subjecting the mass media to hate propaganda laws would do nothing to eradicate hatred and would serve only to hide the most harmless visible symptom of a serious social problem.[143]

Second, liberals say legislation aimed at curbing hate propaganda in the mass media is vague and imprecise. Even if hate literature could be defined adequately, they say there is no reason to believe that many, much less all, members of the community would agree with the definition.[144]

Third, liberals say laws against hate propaganda are dangerous because they may be extended to groups never initially contemplated by the law and consequently may be abused.[145] The "false news" section of the Criminal Code is seriously criticized for this reason.[146] Critics say this law is too broad, too arbitrary and is inconsistent with a free society.[147] Liberals also argue that the prosecution of hate-mongers is counterproductive to the underlying purpose of hate propaganda laws as prosecution provides them with a forum to spread their ideas to a far wider audience than they would otherwise be able to reach.[148]

Fourth, liberals criticize hate propaganda laws because they are inequitably enforced. Group prejudice and hatred is never curtailed when it is packaged in subtle or sophisticated communication wrappings.[149] It is only the crudest and most scurrilous expressions that have attracted legal attention. Liberals see this as inconsistent and hypocritical.

Fifth, legislation curtailing hate propaganda ignores that there might be something to be gained from allowing hate-mongers to speak openly. Liberals claim that hate propaganda has a cathartic effect as once a hate propagandist has spoken his mind, he will be less likely to engage in more serious conduct which could involve violence. Public exposure would also identify hatemongers who would then be subject to the scorn and ridicule of the general community.

Liberals are opposed to any extension of hate propaganda laws. This includes expanding the Criminal Code definition to include within an "identifiable group" persons defined on the basis of their sex.[150] They also argue that the removal of willful intent from the hate propaganda laws in the Criminal Code is dangerous. It would expose persons to criminal sanctions who were unaware of the tendency of their publications and had no desire or intent to incite hatred. A person could be sanctioned for an "unguarded slip of the tongue". Liberals also prefer that the consent of the Attorney General be required prior to a prosecution involving hate propaganda. This requirement is consistent with freedom of expression ideals because it prevents unprincipled, hasty or ill-advised resort to the criminal process in a difficult area of restraint on freedom of expression.[151]

Liberals see danger to free expression if rights legislation is expanded to deal with hate propaganda, particularly when no intention to discriminate or cause discrimination is required to offend the legislation.[152] When all that is needed to offend is an "indication of discrimination" or the expression of an undesirable idea or concept, then an undue "deterrent" or "chilling" effect is created on individuals wishing to exercise their communicative rights and

state control of expression has gone too far.[153] Liberals see this as the state attempting "thought control", an objective more appropriate in a totalitarian system of government than in a society which respects individual freedom. While admitting that freedom of expression in not absolute, liberals question the absolutism of equality.

c) Arguments for Legislative Control of Hate Propaganda

The rationale for legal controls on hate propaganda is the harm which results to the targeted groups and our social fabric from unregulated representations. This justification is consistent with Canada's constitutional priorities, public policy, international responsibilities and standards in other democratic countries.

The view that supports legal constraints on hate propaganda starts from the assumption that the optimal level of freedom is attained when the freedom of each individual is consistent with that of every other individual.[154] Some even question the centrality of speech in a democratic society, saying that only speech which qualifies as political speech should enjoy a preferential status.[155] Regel says any elevation of freedom of expression to preferential status presupposes that freedom of speech is the only necessary right or freedom in a society. He questions this view, positing that freedom of thought, the right to vote, the right to life, liberty and security of the person and the right to equality are equally as necessary in a democratic society.[156]

Support for this view is found in the Report of the Special Committee on Hate Propaganda in Canada.[157] The Committee qualified the liberal "marketplace

of truth" theory. The Committee justified state intervention to limit hate propaganda because they were not convinced that man is a rational creature who can always distinguish truth from falsehood and good from evil, particularly in light of modern sophisticated communication techniques. The Report states:

> "While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumph of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibility if we ignore the way in which emotion can drive reason from the field.[158]

Writers point to the Nazi rule of Germany as a time in history when rational people were persuaded to accept irrational propositions as being the truth.[159] When freedom of speech is used as a tool to persuade others that a certain group should not be treated equally, those in favour of controls say such protection derogates from and is inconsistent with the basis upon which freedom of speech is founded; which is to optimize the level of freedoms and rights enjoyed by each individual in society and to ensure the proper functioning of our democratic political system.[160]

The words of the Canadian Charter of Rights and Freedoms indicate that the framers, when weighing individual freedom of expression against possible legislative intervention, preferred legislative intervention to absolute freedom of expression. This setting of constitutional priorities is reflected in the remarks of the Hon. Mark MacGuigan, when he was Minister of Justice. Appearing before the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society he stated:

> In interpreting the Charter of Rights, Section 27 . . . will have an important role to play. While not conferring any substantive rights, this interpretive provision will ensure that the Charter is applied so as to take into account the multicultural character of the country. For example, governments have enacted provisions which restrict freedom of expression in order to protect visible minorities and other groups against incitement to discrimination, contempt or hatred.
>
> Some individuals might feel such legislation unduly restricts their freedom of speech and therefore challenge it before the courts. Section 27 might be used in support of Section 1 of the Charter to justify these restrictions.

In Canada, unlike the United States, the absolutist approach to protection of speech is largely inapplicable because of the inclusion of s. 27, section 1, s. 15 and s. 28 equality rights in the Charter. All these sections can limit or justify limitations on fundamental freedoms.[161]

Controls on hate propaganda reflect also Canadian policy over a long period of time. A Canadian Rights Commission Tribunal in 1979 commented about Canadian policy on this topic:

> . . . it is Canadian policy that individuals under the guise of freedom of speech and freedom of action cannot say things or take steps or incite or advocate the destruction of freedoms which all of us enjoy.[162]

A number of commissioned reports and legislative responses also reflect this policy. Since 1966 at least nine different reports of commissioned groups have recommended controls on expression when it propagates hatred against identifiable groups. These include the Report of the Special Committee on Hate Propaganda in Canada (1966); the Report Arising out of the Activities of The Klu Klux Klan in British Columbia (1981); the Recommendations of the Vancouver Symposium on Race Relations (1982); Equality Now, the Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society (1984); Group Defamation, Submissions to the Attorney General of Ontario (1984); the MacGuigan Proposals (1984); the Manitoba Rights Code Proposals (1984); the Report of the Special Committee on Racial and Religious Hatred; the Canadian Bar Association Report, (1984); and the Report of the Special Committee on Pornography and Prostitution (1985).

All reports since the Cohen Report (1966) have recommended increased state control on hate propaganda, including removal of the intent requirement, dropping the requirement of the Attorney General's permission to prosecute,

clarifying the accused's responsibility to establish defences to the charge, including "sex" as a protected category, and increasing the power of provincial rights commissions to deal with the problem.

In order to justify limits on expression in s. 1 of the Charter one of the requirements the Crown must meet is that the justification be one that is demonstrable in a free and democratic society. Learned commentators have suggested that courts can look to the legislative standards in other democratic countries to help them with this determination. Anti-hate propaganda legislation has existed for some time in Australia, Austria, Denmark, Federal Republic of Germany, Greece, France, Netherlands, Italy, Sweden, Norway, New Zealand, Switzerland and the United Kingdom and has withstood judicial scrutiny. For example, in 1979, the European Commission of Rights upheld the Netherlands' anti-hate legislation in the case of Glimmerveen and Hagenbeek v. The Netherlands[163] where the court held that the distribution of ideas encouraging racial discrimination in violation of the rights and freedoms of others was not protected free speech under Article 10 of the European Convention on Human Rights.

Related to the standards of other democracies is the argument of international responsibilities. In 1963, the General Assembly of the United Nations supported the Declaration on the Elimination of All Forms of Racial Discrimination. This Declaration was followed by the Convention to Eliminate All Forms of Racial Discrimination, which Canada signed. The Convention specifically called for hate propaganda legislation. In 1978, Canada was a signatory to Article 6(3) of the Declaration on Race and Racial Prejudice (1978). The

Article provides that "laws proscribing racial discrimination are not in themselves sufficient" and that "it is also incumbent on states to supplement them . . . by broadly based educational and research programs designed to combat racial prejudice and racial discrimination and by programs as positive calculated to promote genuine mutual respect among groups". Failure to curtail hate propaganda effectively would put Canada in conflict with its international obligations.

d) The Constitutionality of Hate Propaganda Legislation

There is very little jurisprudence on the constitutionality of hate propaganda legislation to date. The first and only case under s. 281.2(2) of the Criminal Code to challenge the constitutionality of the hate propaganda provisions was R. v. Keegstra, an Alberta case involving a school teacher who promoted hatred against Jews as part of his curriculum. It was argued in a pre-trial notion that section 281.2(2) of the Criminal Code, under which Mr. Keegstra had been charged, was contrary to the guarantee of freedom of expression in paragraph 2(b) of the Charter. The accused argued that the hate propaganda provisions were not constitutionally permissible because they could not be characterized as reasonable limits, prescribed by law in a free and democratic society. The judge, Mr. Justice Quigley, rejected this argument. He took the position that in order to decide the constitutionality of a legislated limit on a fundamental freedom, all the guarantees in the Charter must be considered. He balanced the freedom of expression involved in promoting hatred against equality rights conferred by s. 15 of the Charter. In striking the balance, he also took into account the proviso in s. 27, which requires that the multicultural heritage of Canada, must be taken into account

when interpreting the Charter. Once all these factors were considered, Justice Quigley came to the conclusion that s. 281.2(2) of the Criminal Code is constitutionally valid. The Keegstra decision is presently under appeal to the Alberta Court of Appeal.

The findings of the nine different commissions which have investigated hate propaganda also show that there is a public interest harmed by the dissemination of hate propaganda. All have recommended stronger legal controls than those that presently exist on hate propaganda for the reason that the harm caused by hate propaganda to the inherent dignity and worth of the human person and to the community at large, outweighs harm to individual freedom of expression.[164]

Recommended changes to the criminal law hate propoganda sections are argued to be justified in terms of avoidance of harm to human rights,[165] protection of Canada's multicultural heritage,[166] and education of the public as to the effects of pornography.[167] It is also a widely held view that the criminal law cannot be expected to stand alone to deal with the problem of hate propaganda.[168] Those who assert that the inherent dignity of the human person is the prime value, argue that it must be protected not just by criminal law but at the operational level of provincial and federal human rights commissions.[169]

Human rights intervention into freedom of expression is justified differently than Criminal Code prohibitions. The purpose of human rights legislation is not to punish, but rather to conciliate and educate. In this respect,

justification arguments for human rights legislation will be similar to justification for Broadcasting Act regulations. The Symons Report[170] clearly sets out justifications for human rights interventions on expressions of hatred:

> If there is not freedom for the community to develop in harmony and peace, then there cannot be secure freedom for the individual who lives within it. The individual's right to freedom must be exercised in the context of his or her responsibility to the community of which he or she is a part. The individual's quest for freedom cannot fully succeed if it is accompanied by an indifference or hostility to the freedom of others. Freedom requires a reasonable balance between the rights of the individual and the rights of society. . . . But human rights legislation is concerned less with punishment than with attempting to win the offender to the community consensus. Consequently, it is conciliatory in its thrust. Only when conciliation fails are Boards of Inquiry invoked which may order any party who has contravened the Act to do any act or thing that, in the opinion of the Board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

This view is echoed in the many reports[171] which have also recommended increasing the availability of a civil action.[172] It is therefore quite likely that the harm perceived by these various committees and used to justify increased and more comprehensive regulation of hate propaganda will equally convince a court that these laws and regulations, such as the ones discussed which purport to limit and control hate propoganda, are a reasonable restriction on freedom of expression under s. 1 of the Charter. This approach

on the constitutionality of the Criminal Code provisions is found in the Keegstra case and can be expected to prevail in the future in other areas as long as the impugned provisions is "prescribed by law".

E. Violence in Programming

Broadcasting that includes violence is not specifically addressed in the Broadcasting Act or Regulations, yet compelling arguments are made that regulations in this area are justified, constitutionally supportable,[173] and permissible under the current Act. As the Act and regulations are cast in very wide terms[174] the CRTC could currently deal with program violence. By using its licencing powers under s. 17 and its regulation making powers under s. 16 the CRTC could deal with violence in broadcasting if it had the political will to do so. The breadth of the language in s. 16, which grants the power to make regulations "respecting standards of programs . . . for the purpose of giving effect to paragraph 3(d)[175] or "respecting such other matters as it deems necessary for the furtherance of its objects"[176] would allow the CRTC to make new regulations. This broad wording has tended to insulate the CRTC against legal attack in the past and would probably do so in the future.[177]

In order to justify regulations or the use of the licencing power to limit violence in broadcasting, evidence of harm must exist such that it presents cause for governmental concern and action. There is a strong consensus of expert opinion that the medium of television is a potent force.[178] During the past 22 years, widespread and diverse scholarship have found links between televised and actual violence, particularly with respect to young viewers.[179] Medical authorities have indicated that violence in television poses a health threat to children.[180] The Surgeon General of the United States summarized the findings of a six volume study in the following terms:

> [B]roadcasters should be put on notice. The overwhelming consensus and unanimous Scientific Advisory Committee's report indicates that televised violence, indeed, does have an adverse effect on certain members of our society.
>
> While the committee report is carefully phrased and qualified in language acceptable to social scientists, it is clear to me that the causal relationship between televised violence and antisocial behavior is sufficient to warrant appropriate and immediate remedial action. The data on social phenomena such as television and violence and/or aggressive behavior will never be clear enough for all social scientists to agree on a formulation of a succinct statement of causality. But there comes a time when the data are sufficient to justify action. That time has come.

Two years earlier, the American National and Presidential commission on the Causes and Prevention of Violence[181] summarized its findings on televised violence as follows:

> We believe it is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior and fosters moral and social values about violence in daily life which are unacceptable in a civilized society.
>
> We do not suggest that television is a principal cause of violence in society. We do suggest that it is a contributing factor.[182]

In addition to scientific studies on the effects of televised violence on children, numerous examples of "copy-cat" violent crimes viewed on television and carried out by children have been documented.[183]

The American Medical Association, in response to the numerous studies linking television violence to aggressive behaviour adopted a resolution which states that:

> "TV violence is a risk factor threatening the health and welfare of young Americans, indeed our future society".[184]

A British study financed by a television network concluded that "viewers of violent television programs are more likely to commit violent acts than viewers of more passive fare."[185]

In 1976 in Canada, the Royal Commission on Violence in the Communication Industry noted that the average Canadian child spends more than 12,000 hours in school by the end of high school and in the same period spends even more hours in front of the television set. The Commission noted:

> "It would seem improbable that children could avoid acquiring much of their value system from their television experience."[186]

It would seem probable, given the high number of American television offerings in Canada, and the similarities of the two populations, that the effects of television violence, would be the same in Canada as it is in the United

States. Although only a few studies on television violence have been done in Canada, the results replicate the American studies.[187]

Liberals criticize these studies because they cannot conclusively establish a "clear and present danger". Methodological faults are said to limit the utility of the studies.[188] Some of the studies, due to ethical constraints, must be conducted in laboratory settings and cannot precisely replicate the conditions of the real world.[189] Other studies which collect data on viewing habits and peer perceptions of aggressive or violent tendencies;[190] or which control subject's viewing habits and then observe post viewing conduct; are criticized for lack of control over other possible causes of violent behaviour.[191] Whether these criticisms are relevant to the issue of regulation of broadcasting must be contemplated in the context of the scarcity of airwaves, the pervasiveness of the media and the interests of the state in children's welfare. The Pacifica[192] case, discussed in the section on obscenity, suggests that the "clear and present danger" test for limiting expression is inappropriate when regulations limiting broadcasting are questioned. Given the highly qualified sources of the data on the effects of televised violence, a court will most likely accept these findings of harm at face value. The uniformity of results of the scientific data should be enough to validate the proposition that television violence is harmful and a reduction of the amount of violence on television could be justified in terms of the public interest.

F. Civil Defamation

Defamation is an actionable tort under the civil law which allows the victim to claim monetary compensation when there is a false publication made without justification or lawful excuse, which injures his reputation by exposing him to hatred, contempt or ridicule.[193] It restricts free expression to prevent harm to a person's reputation. It is a strict liability tort where the defendant's good faith is no defence.[194] There are currently three recognized defences to an action in defamation as they operate as exceptions to civil liability they indirectly reintroduce allowable free expression. The greater the number and the wider the content of these defences, the less the law of defamation restricts freedom of expression. The three defences are justification, fair comment, and privilege. The defence of justification can be raised only where the statement is true. The remaining two defences require the balancing of either the public's right to know or the speaker's obligation of disclosure against the victim's right to protect his reputation.[195]

It has been argued that the introduction of s. 2 of the Charter into this balancing process will now tip the balance in favour of freedom of expression. It may do so in two respects. First, the public's right to know or the speaker's obligation of disclosure may take a greater priority over a person's right to protect his/her reputation where the statement is directed towards a person who is a public official. If this is the case, Canadian defamation laws will closely resemble the American position. Under American law, a public official can only recover damages for defamation where he proves that the incorrect statement was made with actual malice, with the knowledge

that it was false or with reckless disregard of whether it was false or not.[196] On the questionable assumption that the Charter regulates private transactions between individuals, a new category of qualified privilege may have been created which would change the law of defamation where the statements involve people in public life.[197]

A second change can also be analogized from the American experience. In the United States the protection given to free speech has also had its effects on the purely private law of defamation: some degree of fault must be shown and punitive damages are only awarded upon proof of actual malice.[198] It is too early to tell whether these two tendencies will also form part of our law.

G. Conclusion

Under s. 1 of the Charter the judiciary must decide when a limitation on freedom of expression is reasonable. A limitation can be justified as reasonable if it is in the public interest and if unregulated expression would cause harm. Using the criminal law of obscenity as a case study we explained that conservatives, liberals and feminists have different conceptions of harm. These different conceptions mean that each group would also limit freedom of expression in broadcasting in different ways and for different purposes. In summary, the conservatives allow restrictions on free expression when they undermine prized collective values; liberals require the demonstration of a clear and present danger which regulation seeks to alleviate and feminists argue that restrictions can be justified when the content and context of expression threatens a person's equality rights.

Increasingly, legislators and judges are broadening the concept of harm, and thereby increasing the number and expanding the content of reasonable limitations on free expression. To the extent that harm may now mean harm to either the social fabric, individual dignity and egalitarian principles we have gone beyond the clear and present danger test proposed by the liberals and have moved closer to the feminist definition of harm. While this tendency is discernible in the jurisprudence and government reports on both obscenity and hate propaganda, the analysis which motivates it can be applied to any type of expression to judge whether it causes sufficient harm to justify restrictions on freedom of expression.

The harm caused by a particular type of expression is judged contextually and its presence or absence can be affected by how the expression is

communicated. The nature of the broadcasting medium increases the intensity of recognized harms because of its pervasiveness, persuasiveness and immediacy. The recognition of the nature of broadcasting and an expanded meaning of harm has the effect of expanding the permissible scope of regulatory control over program content.

FOOTNOTES

1. The remaining justifications differ from balance in broadcasting and the fairness doctrine in two ways. First, they are justifications of general application, which apply to restrictions outside the broadcasting sphere and second, the balancing processes occur between two different rights; only one of which is freedom of expression.
2. P. Devlin, The Enforcement of Morals, London: Oxford University Press (1965), at 15.
3. Ibid., at 17.
4. Ibid., at 18-19.
5. David Alexander Scott, "Pornography - Its Effects on the Family, Community and Culture", The Free Congress Foundation, Inc. (1985).
6. Ibid., p. 3 and 6.
7. Goldstein and Kant, Pornography and Sexual Deviance, 139-53.
8. G. Steiner, "Night Words: High Pornography and Human Privacy", in Perspectives on Pornography, 96-108. Even though Steiner expressed disapproval of censorship, his views have been taken by conservatives as arguments supporting censorship.
9. Irving Kristol, in "Pornography, Obscenity and the Case for Censorship", argues that pornography depersonalizes sex, reducing it to animal activity and thus debases it. Because it involves essentially the reader's sexual arousal only, it promotes in "infantile" sexuality dangerous to society. Infantile sexuality,

or masturbation is dangerous because once sexuality becomes fixed in this mode, adult sexual relationships are impossible.

10. W. Berns, "Pornography vs. Democracy: The Case for Censorship", The Public Interest 22 (Winter (1971).

11. E. Van der Haag, Censorship: For and Against, 146-48.

12. Ibid.

13. W. Berns, supra, note 10 at 12:

> "It is easy to prove that shamefulness is not the only principle governing the question of what may properly be presented on the stage; shamefulness would not, for example, govern the case of a scene showing the copulating of a married couple who love each other very much. That is not intrinsically shameful - on the contrary - yet if ought not to be shown. The principle here is, I think, an aesthetic one; such a scene is dramatically weak because the response of the audience would be characterized by prurience and not by a sympathy with what the scene is intended to portray, a beautiful love. (emphasis added)

14. M. Ernst & W. Segal, To the Pure - A Study of Obscenity and the Censor 176 (1928).

15. R. v. Curl, 2 Strange 788, 93 E.R. 849 (K.B. 1727). Although obscenity prosecutions were relatively rare throughout the eighteenth century, by the nineteenth century there were about three prosecutions each year. Charges were laid against works that were purely sexual in content, largely because of the activism of the Society for the Suppression of Vice, founded in 1802. Byron's Don Juan and Shelley's Queen Mab were both found to be obscene along with 152 other publications, out of 159 prosecuted. A charge was brought against the publisher of "Venus in the Cloister or the Nun in Her Smock", a book about lesbian love in the convent. The majority of the court accepted the conservative argument

that morality was an area of expression subject to the restrictions of the common law. The majority held that the publication:

> [was] an offence at common law as it tends to corrupt the morals of the King's subjects and is against the peace of the King. Peace includes good government and order and thus peace may be broken without actual force . . . if [it be] against morality.

16. J. Schauer, The Law of Obscenity (1976). In his book, Mr. Schauer describes how the efforts of the Society for the Suppression of Vice resulted in obscenity prosecutions emphasizing works that were purely sexual in context thus moving away from the requirement in earlier cases of finding political or religious implications in the obsene depcition.

17. 149 D.L.R. (3d) 243 (B.C. Cty. Ct. 1983).

18. The decision was reversed on other grounds in the Federal Court of Appeal.

19. David Scott, supra, note 5.

20. J.S. Mill, On Liberty (1859), ed., E. Rapport, (Indianapolis: Hachett Publishing Co., 1978).

21. Ibid., at 9.

22. "Psychic" harm is recognized as that type of harm individuals experience when they are involuntarily exposed to offensive conduct or depictions of offensive conduct in public. See Canadian Civil Liberties Association, Pornography and the Law (1984), at p. 15.

23. These words were used in the Report of the Committee on Homosexual Offences and Prostitution (Cmnd. 247, 1957) to describe the role of the law in controlling adult, consensual, homosexual activity.

24. See H.L.A. Hart, Law, Liberty and Morality (1963).

25. Ibid., at 83.

26. Ibid., at 83.

27. F.R. Berger, "Pornography, Sex and Censorship" in Pornography and Censorship: Scientific, Philosophical and Legal Studies, eds. D. Copp and S. Wendell, (1983).

28. Liberals point to studies that show convicted sex offenders had less exposure to pornography as adolescents than did non-sex offenders, citing them as proof that negative social effects do not necessarily correlate to exposure to pornography.

29. Supra, n. 27 at 94.

30. Ibid.

31. Canadian Civil Liberties Association, supra, note 22.

32. An illustration of this principle is provided in Pornography and Prostitution in Canada, Report of the Special Committee in Pornography and Prostitution, vol. 1 at p. 16.

> Thus, for example, it is legitimate to proscribe driving while under the influence of drink because it has been proven to cause accidents. It is not, however, legitimate to proscribe drinking for that reason.

33. See note 22, supra. The public/private distinction was also made by the Law Reform Commission of Canada in Limits of Criminal Law, Obscenity: A Test Case, Working Paper 10.

34. Supra, note 22 at p. 16.

35. Ibid.

36. For example, see Charnie Guettel, Marxism and Feminism, (Toronto: the Woment's Press 1974).

37. For example, see Beatrice Faust, Women, Sex and Pornography, (Harmondsworth: Penguin Books, 1980, 180-189).

38. Canada, Report of the Special Committee on Pornography and Prostitution, Minister of Supply and Services Canada, Vol. 1 at p. 19 (1985).

39. For a discussion of this view, see K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", 17 Ottawa Law Review No. 1 (1985).

40. Longino, "Pornography, Oppression and Freedom: A Closer Look, in Take Back the Night: Women on Pornography 40 (L. Lederer ed. 1980).

41. Debra Lewis, a feminist criminologist, defines pornography as material that "[d]epicts, condones and encourages acts of domination, degradation and violence towards women" in the Report of the Standing Committee on Justice and Legal Affairs, No. 12, at 4 (1978). The National Action Committee on the Status of Women has defined pornography as:

> [a]ny printed, visual, audio or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.

This definition is cited in Canadian Civil Liberties Association, supra, note 22 at 5. See also, Report of the Municipality of Metropolitan Toronto Task Force on Public Violence Against women and Children 27 (1984), which formulated a similar definition. The Canadian Advisory Council on the Status of Women defines pornography as:

> a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behavior in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such

behavior can be taken to be advocated or endorsed, in the Canadian Advisory Council on the Status of women, Brief of the Special Committee on Pornography and Prostitution, 3 (1984).

42. For example, the National Film Board production, Not a Love Story: A Film About Pornography, contained explicit, degrading and violent sexual depictions and was banned from commercial theatres in Ontario for this reason. If the film had been scrutinized under any of the feminist definitions cited above, it would not have been banned, because the context would have been examined. The depictions, although offensive when taken out of context, provided a powerful medium for a highly moral film affirming women's dignity and worth.

43. Feminist definitions of erotica share themes of non-violence and equality. For example, Bart and Jozsa state, "[A] film showing two people making love is much different from one portraying the rape and murder of women for male sexual stimulation." Bart & Jozsa, "Dirty Books, Dirty Films and Dirty Data", in Take Back the Night: Women on Pornography 204, at 207 (L. Lederer ed. 1980).

44. Steinem, Erotica and Pornography: A Clear and Present Difference, in Take Back the Night: Women on Pornography 35, at 37 (L. Lederer ed. 1980).

45. Steinem claims pornography is violence, dominance, and conquest. "It is being used to reinforce some inequality, or to create one, or to tell us that pain and humiliation (ours or someone else's) are really the same as pleasure. . . . Perhaps one could simply say that erotica is about sexuality, but pornography is about power and sex-as-weapon in the same

way we have come to understand that rape is about violence, and not really about sexuality at all". Id., at 37-38.

46. T. McCormick, "Making Sense of Research on Pornography" 37, a report for the subcommittee of the Metropolitan Toronto Task Force on Violence Against Women (1983).

47. Check & Malamuth," Pornography and Sexual Aggression: A Social Learning Theory Analysis", in Communication Yearbook 9 (M. McLaughlin ed. 1985). See also, Pornography and Sexual Aggression (N. Malamuth & E. Donnerstein eds. 1984). It has been demonstrated in content analytic research that violent and degrading pornography can have a number of effects. Subjects exposed to pornography demonstrate an increased acceptance of rape myths, increased acceptance of violence against women, increased rape fantasies, increased aggressive behaviour toward women in a laboratory setting, decreased future perceptions of rape victim suffering, a future desensitization to sexual violence and an increased reported willingness to rape.

48. H. Gysenck & D. Nias, Sex, Violence and the Media (1978) at 259.

49. See note 2, supra.

50. For a discussion of the jurisprudential dimension of liberalism and the definition of justice as neutrality between abstract categories, see C.A. MacKinnon, "Pornography, Civil Rights and Speech", [1985] 20 Harvard Civil Rights - Civil Liberties Law Review, 1.

51. See, Department of Justice, Special Committee on Pornography and Prostitution, Issues Paper 11 (1983).

52. See, L. Clark & D. Lewis, The Price of Coercive Sexuality (1977) 61. They

state that the incidences of rape increased by 174% between 1961 and 1971. In the period 1969-1973, it increased 76%.

53. Armstrong, "Wife Beating: Let's Stop it Now,", Canadian Living 89 (July 1983), states that one woman in every ten is beaten by her husband or common-law mate.

54. Report of the Committee on Sexual Offences Against Children and Youths 180-83 (Badgley ed. 1984), states, among other staggering statistics of abuse, that 50% of women and 30% of men have been victims of unwanted sexual acts, the majority of these occurring before they were legal adults.

55. See p. 5.15 to 5.19, infra.

56. S.C. 1892, c. 29, s. 179.

57. R. v. Hicklin (1868), 3 Q.B.D. 360.

58. The "deprave and corrupt" theory is interpreted in D.P.P. v. Whyte (1972), 3 W.L.R. 410. In R. v. American News (1957), 118 C.C.C. 152 (Ont. C.A.), it was made clear that in Canada this assumption could not be challenged by expert testimony.

59. In Brodie v. The Queen, [1962] S.C.R. 681, 32 D.L.R. (3d) 507, the majority of the Supreme Court of Canada held that the new definition was the exclusive test of obscenity, thereby rendering the Hicklin test obsolete.

60. S.C. 1959, c. 41, s. 159(8).

61. The word "obscenity" in the Criminal Code, wherever it appeared was covered by this section, however, other words such as "scurrilous", "disgusting", "immoral", and "indecent", are also used. Cases indicate

that the obscenity definition is the standard used when these other words are interpreted.

62. In England this is not the case. In John Calder (Publications) Ltd. v. Powell, [1965] 1 Q.B. 509, [1965] 1 All E.R. 159 (1964), it was held that a book advocating drug use had the tendency to deprave and corrupt and was, therefore, obscene. In R. v. Calder & Boyars Ltd., [1969] 1 Q.B. 151, [1968] 3 All E.R. 644 (C.A. 1968), it was held that violence per se was obscene, a finding similar to that in D.P.P. v. A. & B.C. Chewing Gum Ltd., [1968] 1 Q.B. 159, [1967] 2 All E.R. 504 (1967).

63. S.C. 1959, c. 41, s. 159(1)(a).

64. S.C. 1959, c. 41, s. 159(2)(a). Section 159(1) states:

> Every one commits an offence who
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or
> (b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

Section 159(2) states:

> Every one who commits an offence who knowingly, without lawful justification or excuse,
> (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever . . .
> (b) publicly exhibits a disgusting object or an indecent show,
> (c) offers to sell, advertises, publishes and advertisement of, or has for sale or disposal any means, instruction, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or
> (d) advertises or publishes an advertisement of any means, instructions, medicine, drugs or article intended or represented as a method for restoring

sexual virility of curing venereal diseases or diseases of the generative organs.

65. As the Crown is not required to adduce evidence of community standards, this determination is often made by the judge based on his understanding and appreciation of community levels of tolerance.

66. [1965] 1 O.R. 557, [1965] 2 C.C.C. 304 (C.A. 1964).

67. Roach J.A., in dissent, adopted the classic conservative view. In his judgment he said that the book in question "descends to the lowest possible level of impurity or lust in that it is a deification of the phallus. . . . It is plain, unvarnished dirt for dirt's sake." Id., at 573, [1965] 2 C.C.C. at 322-23.

68. The first cases to look beyond explicit sex for obscenity did so without contemplation of equality principles. In Delorme v. The Queen, Histoire d'O 21 C.R.N.S. 305, 15 C.C.C. 350 (Que. C.A. 1973), Even though the extreme brutality was directed at the female character and endorsed in the overall context of the book, the Court did not consider any negative impact that the book might have on women or on equality between the sexes. The Ontario Court of Appeal, in Re Gordon Magazine Enterprises Ltd., 46 C.R. 313 (Ont. C.A. 1965), on an appeal from a forfeiture order, held that in the pocket novels seized, sex was a dominant characteristic associated in varying degrees with crime, horror, cruelty and violence. No further analysis was offered by the Court. The majority of the Court held that the book, "Histoire d'O" was obscene because it contained repeated descriptions of sexual acts - both normal and abnormal - accompanied by acts of extreme brutality.

69. (Unreported, Ont. Cty. Ct., 10 Jan. 1980).

70. 9 C.C.C. (3d) 53 (Ont. Cty. Ct. 1983). In R v. Intercity News Co., (unreported, Ont. Prov. Ct., Jul. 1982), a magazine was found to be obscene where the Court found an article "display[ing] violent and abnormal sex in an objectionable and repulsive manner".

71. 9C.C.C. (3d) 53 at 70.

72. (1984), 14 C.C.C. (3d) 230.

73. Id., at 240.

74. R. v. Wagner (1985), 43 C.R. (3d) 318, 36 Alta. L.R. (2d) 301 (Q.B.).

75. Supra, note 70.

76. Supra, note 72.

77. Supra, note 74.

78. R.S.C. 1970, c. C-34, sub. 159(8).

79. Supra, note 74.

80. Ibid.

81. (1985), 45 C.R. (3d) 36. The Supreme Court of Canada refused leave to appeal in the case.

82. Ibid.

83. (1985), 45 C.R. (3d) 1.

84. Donnerstein, Pornography and Violence Against Women: Experimental Studies, 347 Annals of the New York Academy of Science 277, at 287 (1980). In another summary of research, psychologist Edward Donnerstein concluded:

> Given the increase in sexual and other forms of violence against women depicted in the media, a concern over such presentations seems warranted. There is ample evidence that the observation of violent forms of media can facilitate aggressive response.

85. Report of the Standing Committee on Justice and Legal Affairs, No. 3, at 7 (1978). At 3-4 they commented on the image that pornography presents of women:

> This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation, and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail. . . . The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable.

86. Report of the Special Committee on Pornography and Prostitution, supra, note 39.

87. The Broadcasting Act, S.C. 1967-8, c. 25, s. 2.

88. S.O.R./84-787.

89. S.O.R./84-788.

90. C.R.C., Vol. IV, c. 379, at 2559 (Regulation 5) and C.R.C., Vol. IV, c. 380, at 2582 (Regulation 6); C.R.C., Vol. IV, c. 381, at 2606.

91. Ibid.

92. C.R.C., Vol. IV, c. 381, at 2606.

93. Supra, note 90, s. 5(1)(f), s. 6(1)(d), s. 6(1)(f).

94. Supra, note 88.

95. Regulation 7 S.O.R./84-797.

96. Supra, note 39, p. 184.

97. Supra, notes 74, 81.

98. F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

99. Ibid

100. Pacifica Foundation, 56 F.C.C. 2d 94 (1975).

101. Supra, note 98.

102. (1985) 17 D.L.R. (4rth) 503 (F.L.A.).

103. Ibid.

104. Supra, note 74, at 81.

105. See D.R. Siddal, "Constitutional Regulation of Indecent or Obscene Cable Television Programs", Congressional Research Service, The Library of Congress (March 1984).

106. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 388 (1969).

107. Supra, note 98.

108. Home Box Office v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982).

109. The Miller definition of obscenity is:

> (a) [W]hether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value.

Miller v. California, 413 U.S. 15 at 24-26 (1973).

110. Community Television of Utah, Inc. v. Roy City 555 F. Supp. 1164 (D. Utah 1982).

111. Home Box Office v. F.C.C., 567 F.2d 9 at 46 (D.C. Cir. 1977) cert. denied, 434 U.S. 820 (1977).

112. 567 F.2d 9 at 46.

113. See for e.g., Community Communication v. City of Boulder, 660 F.2d 1370 at 1379 (10th Cir. 1981), petition for cert. dismissed by agreement, 456 U.S. 1001 (1982); Omega Satellite Products v. City of Indianapolis, 694 F.2d 119 at 127-128 (7th Cir. 1982).

114. Ibid.

115. Omega Satellite Products v. City of Indianapolis, 694 F.2d 119 at 127-128 (7th Cir. 1982).

116. 51 D.L.R. (2d) 716; 52 W.W.R. 286.

117. Capital Cities Communications Inc. v. CRTC, [1978] 2 S.C.R. 141; La Regie des Services Publics v. Dionne, [1978] 2 S.C.R. 191.

118. [1923] A.C. 304.

119. Ibid., p. 315.

120. Supra, note 98.

121. See discussion p. 5-1 to 5-19.

122. Criminal Code, s. 177:

> s. 177 Everyone who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

123. Criminal Code, s. 281:

> 281.1 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (2) In this section "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely;
>
> (a) killing members of the group, or
>
> (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
>
> (3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
>
> (4) In this section "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin.

124. Criminal Code, s. 282.2:

> 282.2 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

(a) an indictable offence and is liable to imprisonment for two years; or
(b) an offence punishable on summary conviction.
(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of
(a) an indictable offence and is liable to imprisonment for two years; or
(b) an offence punishable on summary conviction.

125. Criminal Code, s. 281.2(3):

(3) No person shall be convicted of an offence under subsection (2)
(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

The section also requires in subsection (6) of s. 281.2 that the Attorney General consent to a prosecution under the section.

126. M. Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy" (1970), 9 Alta. L. Rev. 103 at 113.

127. This is evident in the powers and jurisdiction granted to Human Rights Commission in all the enabling legislation.

128. The Canadian Human Rights Act, S.C. 1976-77, c. 33 as amended.

Hate messages
13(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate

telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Exception
13(2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

Interpretation
13(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by the person are used by other persons for the transmission of such matter.

The protection under this section is limited to the use of a federally operated telephone service but only in the Yukon, the Northwest Territories, Ontario, Quebec and British Columbia because of limited federal jurisdiction over telephone services. The Canadian Human Rights Act does not address imported or exported hate propaganda or hate propaganda sent by mail or communicated electronically.

129. The Manitoba Human Rights Act, C.C.S.M., c. H-175 enacted by S.M. 1974, c. 65 as amended states:

Discrimination prohibited in notices, signs, etc.
2(1) No person shall
(a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
(b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;
any notice, sign, symbol, emblem or other representation
(c) indicating discrimination or intention to discriminate against a person; or

(d) exposing or tending to expose a person to hatred; because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

130. The Saskatchewan Human Rights Code, R.S., c. B-31 as amended states:

> Prohibitions against publications
> 14(1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of, any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age nationality, ancestry or place of origin.
>
> 14(2) Nothing in subsection (1) restricts the right to freedom of speech under the law upon any subject.

131. To launch a human rights complaint the complainant initiates a process of investigation by a human rights commission. Before the matter can go to a formal hearing, a process of attempted conciliation is required. This process if often very lengthy but it has a definite cost advantage to a complainant because the commission bears the cost of the proceedings. Human rights commissions cannot provide interim relief, such as an injunction, which would ordinarily be available as a pre-trial remedy in an ordinary civil case. A problem with enforcement of provisions prohibiting hate propaganda in both Saskatchewan and Manitoba arises when the hate propaganda originates outside of either of the provinces. When this occurs, only the Human Rights Commission in the province of origin has the jurisdiction to deal with it. While most provinces do not have provisions that address hate propaganda, ones that do are often powerless to deal with it.

132. The British Columbia Act, S.B.C. 1981, c. 12, creates a class of "prohibited acts" defined as

> "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

> (a) hatred or contempt of a person or class of persons, or
> (b) the superiority or inferiority of a person or clan of persons in comparison with another or others,
>
> on the basis of colour, race, ethnic origin or place of origin".

133. The Manitoba Defamation Act, R.S.M. 1970, c. 30, provides in subsection 19(1) that:

> (1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt, or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action. An action may be taken against the person responsible for the authorship, publication, or circulation of the libel.

134. These were in substitution for regulations already in effect.

135. S.O.R./84-787.

136. S.O.R./84-788.

137. The Broadcasting Act, supra, note 87, s. 17.

138. H.W. Arthurs, "Hate Propaganda - An Argument Against Attempts to Stop it by Legislation" (1970), Chitty's Law Journal, Vol. 18, No. 1, p. 2.

139. Ibid.

140. Hate propagandists are often referred to as "marginal creeps" who could conduct their annual meetings in a telephone booth.

141. Special Committee on Hate Propaganda, Report to the Minister of Justice, Supply and Services Canada, p. 59.

142. H.W. Arthurs, supra, note 138.

143. F.S. Haiman, Speech and Law in a Free Society (1981), Univ. of Chicago Press.

144. The British Columbia Civil Liberties Association, Censorship: Hate Literature - A Position Paper, 1968-1969.

145. Ibid.

146. Section 177 of the Criminal Code makes it an offence to knowingly publish a false statement that causes or is likely to cause injury or mischief to the public interest.

147. Globe and Mail, March 18, 1985.

148. Liberals contend that if convicted, hate mongers assume a martyr's role and their cause is elevated in the public's mind. Conviction and imprisonment may be welcomed by the hate-monger because he is driven by dark compulsions which make him perceive himself as the victim of society and its values. The effect of prosecution the, could increase hate-mongering rather than diminishing it.

149. F.S. Haiman, supra, note 143 at p. 88.

150. It is argued that it is not possible to analytically distinguish the element of hate from other elements of sexual behaviour in sexual expression. Liberals see pornography, in all its forms, as having as its purpose sexual arousal and sexual satisfaction, regardless of the fact that it may take the form of sexual assault and degradation. To attempt to describe male prejudice, male claims of superiority over women and male imposition of social and economic inferiority on women as "hatred", it is argued, would involve a gross and unjustifiable exaggeration. See H.R.S. Ryan, "The Trial of Zundel, Freedom of Expression and the Criminal Law" (1985), 44 C.R. (3d) 334.

151. Ibid.

152. See E.H. Lipsett, "Freedom of Expression and Human Rights Legislation: A Critical Analysis of s. 2 of the Manitoba Human Rights Act" (1982-83), 12 Man. L.J. 285 at 288.

153. Ibid., p. 288.

154. See, Immanuel Kant, Critique of Pure Reason New York: MacMillan & Co. Ltd., 1965, trans. by N.K. Smith at 312. The Canadian Bar Association, Report of the Special Committee on Racial and Religious Hatred, July, 1984, specifically cited Kant as articulating their rationale.

155. Alan R. Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech", 49 Sask. L.R. 303 at 308.

156. Ibid.

157. Supra, note 141.

158. Ibid., at p. 8.

159. Israel A. Ludwig, "League for Human Rights", Presentation to the Manitoba Human Rights Commission, January 11, 1983 at 3.

160. Regal, supra, note 155 at 309.

161. See R. v. Keegstra, and R. v. Red Hot Video, supra, note 81.

162. The Canadian Human Rights Commission v. John Ross Taylor, Report of a Tribunal of Inquiry under the Canadian Human Rights Act, July 20, 1979.

163. 1979, 4 E.H.H.R. 260.

164. Suggested amendments to the Criminal Code include: deletion of the word "willfully" from s. 281.2(2) to remove the difficulty faced by the Crown when they must prove that the accused specifically intended to promote hatred against an identifiable group; deletion of the requirement in s. 281.2(6) that a prosecution have the consent of the Attorney General; clarification that the accused is responsible for establishing defences

available pursuant to the Criminal Code; deletion of defences in subsection 2(b) and (c) of s. 281.2(2), allowing only the defences of "truth" and "efforts to remove feelings of hatred toward an identifiable group"; broadening the definition of "identifiable group" in subsection 281.1(4) to include sex, age, mental or physical disability at least insofar as the definition applies to s. 281.2 of the Code; clarify visual representations which promote hatred would be covered by s. 281.2.

165. In their Report, Equality Now!, the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society states:

> "The purpose of expression or association is to encourage the exchange of ideas and the critical examination of social, political, economic and cultural issues. These freedoms enhance debate and help resolve controversy. Hate literature narrows the debate, and promotes, in its extreme, the possible elimination of the debaters. It advocates the limitation or elimination of the human rights groups and individuals."

166. The Canadian Bar Association Report stressed the importance of Canada's multicultural heritage:

> ". . . there is a proper role for law to play, both at a criminal and civil level, in addressing the dissemination of hate propaganda. For our minorities, the objective of enhancing Canada's multicultural heritage and, for individual Canadians, of fostering a climate of mutual respect, persuades us that we ought not to shy away from strengthening the convictions which we have already put in writing in the Criminal Code.

167. The Fraser Committee Report stressed the symbolic importance of including "sex" as an identifiable group so that the public will be educated to the real evil of pornography as a form of hatred and sex discrimination rather than a form of sexual immorality. The Report states:

> "We think that one of the important reasons for extending the reach of s. 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of

> hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornography from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.

168. Education as well as law enforcement must be brought to bear on the problem. Specific recommendations to human rights law include: enactment of provisions prohibiting publication of statements which create an unreasonable risk that an identifiable group will be exposed to violence or hatred or which constitute an unreasonable affront to the human dignity of a person belonging to an identifiable group; improvement of outreach programs and race relations divisions, funding for such endeavours; broadening the jurisdiction of the Canadian Human Rights Commission to hear complaints dealing with the import and export of hate propaganda and its dissemination through the mails and on radio, television and cable services.

169. The Canadian Bar Association in its Report states:

> . . . there is a cogent case for legislative change at the level of human rights codes and perhaps by means of group defamation statutes. The central point is the Kantian imperative which lies at the heart of all human rights legislation. Few would contest the assertion that the inherent dignity of the human person is the prime value. As such, at a minimum, it ought to be protected from hatemongers at the operational level of provincial and federal human rights commissions, not just as a matter of law and law enforcement, but on the crucial front of education as well.

170. Symons Report, Life Together: A Report on Human Rights in Ontario (1977).

171. See The McAlpine Report, The Report of the Special Parliamentary Committee, the Lawlor Report and the MacGuigan Proposals.

172. The Lawlor Report on Group Defamation proposed that the Ontario Human Rights Code be amended to permit individuals and groups exposed to hatred to seek a civil remedy. Equality Now!, the Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society suggested that victims of hate propaganda be given the option of a civil suit against a discrimination rather than the complaint process established under the Human Rights Commission.

The Fraser Committee recommended that legislation along the line of the British Columbia Civil Rights Protection Act be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and that the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography. Philosophical, substantive justifications for additional civil law actions to address hate propaganda are similar to those for human rights actions but there are also procedural justifications cited. No permission is required from the Attorney General, the plaintiff is in control of the case, the hearing is in a public forum, it could be less timeconsuming than a human rights action and a broader range of remedies are available, including injunctive relief.

173. James A. Albert, "Constitutional Regulation of Televised Violence", 64 Virginia L.R. 1299 (1978). For a contrary view, see T. Krattenmaker and L.A. Powe Jr., "Televised Violence: First Amendment Principles and Social Science Theory", 64 Virginia L.R. 1123.

174. E.g., ". . . the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada" (s. 3(b)); also ". . . the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominately Canadian creative and other resources" (s. 3(d)).

175. S. 16(b)(i).

176. S. 16(b)(ix).

177. C.C. Johnston, Law Reform Commission of Canada, "The Canadian Radio-Television and Telecommunications Commission" Administrative Law Series Study Paper, Supply and Services Canada (1980).

178. See discussion in James A. Albert, supra, note 173, at 1300-1302.

179. For e.g., see Andison, "TV Violence and Viewer Aggression: A Cumulation of Study Results 1956-1976", 41 Pub. Opinion Q. 314 (1977); Surgeon General's Report, "Television and Growing Up: The Impact of Televised Violence" 1, 21 (1972).

180. Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, 92d Cong., 2d Sess. 25, 26 (1972) (statement of Dr. Jesse Steinfeld, Surgeon General).

181. National Commission on the Causes and Prevention of Violence, Mass Media and Violence (1969).

182. Ibid., 199.

183. R. Liebert, J. Neale and E. Davidson, The Early Window (1973), at 1-3.

184. AMA, Proceedings of the House of Delegates 200 (June 1976) (Resolution No. 38) cited in J.A. Albert, supra, note 173.

185. "British Research Claims Linkage In TV Violence and Real Thing", Broadcasting, September 26, 1977, 46 at 46 cited in James A. Albert, supra, note 173.

186. Cited in Mediawatch Inc., Brief to the Task Force on Broadcasting, August 19, 1985.

187. G.T. Fouts, "Effects of TV on Children and Youths: A Developmental Approach", Dept. of the Royal Commission on Violence in the Communications Industry, Vol. 6: Vulnerability to Media Effects, Queens Printer, Toronto, Ont. (1977) 1-123; G. Grantzberg, "TV As Storyteller: The Algonkian Indians of Central Canada", Journal of Communications 1982, Vol. 32, 43-52; G. Grantzberg, "The Effects of Violent TV on Children's Aggression: Elicitation, Disinhibition, or Catharsis?", U. of Man., 1983 Ph.D. Dissertation; T.M. Williams, "A Before-And-After Study of the Effects of TV", Telecommunications in Trans-Cultural Perspective eds. J. Steinbring and G. Grantzberg, University of Winnipeg, 1980 (Collection of Papers); D. Moriarty and A.E. McCabe, "Studies of TV and Youth Sports", Dept. of the Royal Commission on Violence in the Communications Industry, Vol. 5, Learning from the Media, Toronto, Ont., Queen's Printer (1977), 90-170.

188. T.G. Krattenmaker, L.A. Powe Jr., supra, note 173; Kaplan and Singer, "Television Violence and Viewer Aggression: A Reexamination of the Evidence", J. Soc. Issues, Fall 1976, at 35, 55; Wilson, "Violence, Pornography, and Social Science, Pub. Interest, Winter 1971, at 45.

189. For example see, A. Bandura, "Aggression" (1973); Bandura, Ross and Ross, "Vicarious Reinforcement and Initiative Learning", 67 J. Abnormal and Soc. Psych. (1963), 601; Bandura, Ross and Ross, "Initiation of Film-Mediated Aggressive Models", 66 J. Abnormal and Soc. Psych. 3 (1963); Hanratty, Liebert, Morris and Fernandez, "Initiation of Film-Mediated Aggression Against Live and Inanimate Victims", 4 Am. Psych. Ass'n. Proceedings 457 (1969); G. Comstock, "Television and Human Behavior: The Key Studies" 39 (1975).

190. For example see, Eron, "Relationship of TV Viewing Habits and Aggressive Behavior in Children", 67 Journal Abnormal and Soc. Psych. (1963) 193; Lefkowitz, Eron, Walder and Huesman, "Television Violence and Child Aggression: A Follow-up Study", 3 Television and Social Behavior, Surgeon General's Report, overview volume, 141.

191. See critique of social scientific studies by law professors Krattenmaker and Powe, "Televised Violence: First Amendment Principles and Social Science Theory" 64 Virginia L.R. No. 8, 1123 (1973), p. 1147.

192. Supra, note 98

193. For a brief discussion of the difference between the law of libel and slander as applied to the broadcasting media see Anne Skarogard ibid., at 298.

194. All the plaintiff must prove is that the statement was published about him, that the statement defamed him and that the statement was published by the defendant. For a full discussion of these requirements see Anne Skarsgard, "Freedom of the Press: Availability of Defences to a Defamation Action" (1983), 45 Sask. L. Rev. 287 at 299; Keith R. Evans, "Defamation in Broadcasting" (1984), Dal. L.J. 659.

195. To establish the defence of fair comment the defendant must prove that the comment was on a matter of public interest, was fair and that the words complained of were comments and not statements of fact. Absolute privilege can be claimed in a limited number of cases, all of which are inapplicable to the media. Qualified privilege, however, is available and it requires that society's interest in having the communication made outweights the possibility of it turning out to be incorrect. See A. Skarsgard, ibid., at 303 et seq.

196. This argument is presented in Michael R. Doody, "Freedom of the Press, The Canadian Charter of rights and Freedoms - A New Category of Qualified Privilege" (1983), 61 Can. Bar Rev. 125.

197. Clare Beckton, "Freedom of the Press" in W. Tarnopolsky and G. Beaudoin ed., Canadian Charter of Rights and Freedoms: A Commentary (1982), 75 at 90.

198. Ibid., at 91.

5. THE PRESERVATION OF EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The last justification for curtailing freedom of expression is based on the need to preserve, respect and uphold equality rights. The dual purpose of equality rights is to safeguard the rights of minority groups from improper incursions by the majority and to ensure that individuals are treated according to their personal merits and abilities and not on the basis of their group affiliation or stereotyped characteristics. Completely unfettered freedom of expression conflicts with equality rights as certain expressions tend to undermine the dignity of protected groups. Some forms of expression therefore constitute discrimination. For example, certain obscene publications discriminate against women by depicting women as submissive, unequal sexual objects. Similarly, expressions which qualify as hate propaganda or contain sexual or racial stereotyping improperly emphasize imputed group characteristics at the expense of personal integrity.

Damage to equality rights as a justification for restrictions on free expression may also fall under the wider rubric of "harm" discussed in the previous section. It is, however, best to separate equality from the larger category of harm because of the Charter's explicit protection of equality rights. Because of the specific legal issues the Charter's equality sections raise we treat equality rights as a distinct justification, although we recognize some overlap, as our examples indicate, between justifying restrictions on the basis of harm generally and more particularly, the harm to equality rights.

The equality sections of the Charter are relevant in two ways. First, they can be used to justify restrictions on expression by balancing the competing interests of freedom of expression and equality rights. This competition arises in the regulation of broadcasting through statutes, regulations, licence conditions and administrative policies. The government will claim that its activity in relation to broadcasting, either through its law making powers, through the CRTC as its agent, or the CBC as a Crown corporation, must be consistent with the equality rights entrenched in the Charter. The government will argue that it is justified in restricting discriminatory representations when its limitations on free expression preserve equality rights.

The second aspect of the equality rights sections is that they may require something of the government. Failure to meet its Charter obligations under s. 15 may open the government to direct attack. The extent of those obligations are, however, unclear. At the very least, government controls over the content of broadcasting must not discriminate against individuals or groups on the basis of the prohibited grounds in s. 15. In addition, however, it is arguable that the government's obligation may go further and require it to actively promote equality rights through its broadcast policy.[1] A positive duty of this sort means that efforts which fall short of its obligation may constitute a breach of the Charter; in this case liability would rest on the failure to promote equality principles. The nature of the government's obligation will be studied more fully later in this section.

Section 15 is therefore both a justification for limiting freedom of expression and a potential source of liability. It is important to highlight that the extent to which the Charter requires the government to prevent discrimination or promote equality under s. 15 may be an answer to a broadcasting law or policy which curtails freedom of expression. The government should therefore be keenly interested in the equality rights section in the Charter.

The critical equality sections are ss. 15 and 28. They read:

> s. 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 15(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> s. 28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

These sections raise many unresolved legal questions, leaving much room for speculation and competing arguments on their scope, construction and effects. Several factors explain the current rather open-ended state of knowledge on equality rights. First, s. 15, the cornerstone of equality rights, has only been an operative part of the Charter since April 17, 1985. Its newness accounts for the lack of clarifying jurisprudence and the widespread disagreement concerning its proper scope. Second, Canadian jurisprudence on the equality provision in the Bill of Rights is of limited utility in interpreting s. 15 as s. 15 was enacted in its current form to circumvent the judiciary's unduly circumscribed reading of the equivalent provision in the Bill of Rights. Third, American jurisprudence also provides little assistance. The fundamental differences between the wording of the Canadian and American equality provisions and the absence of an American equivalent to s. 28, means the American approach is of questionable or at least qualified, relevance.

The need for a strictly Canadian approach to equality rights requires canvassing some of the more detailed issues which arise under s. 15, to appreciate the limits and restrictions of this justification and to outline the government's potential liabilities. In particular, the intended scope and probable construction of s. 15, the operative concept of equality required by s. 15, and the role allocated to discrimination are reviewed. These issues are then be placed in the broadcasting context by studying gender and race stereotyping. This section concludes with a discussion on the nature of the obligations imposed under s. 15 and the government's potential liability if they are not fulfilled.

A. Scope of Section 15

As noted previously, s. 15 was intended to grant more protection to equality rights under the Charter than they received under the Bill of Rights. The phrases "equal before and under the law" and "equal protection and benefit of the law" were a direct attempt to overcome the narrowness of the Supreme Court's application of s. 1(b) of the Bill of Rights which gave everyone the "equal protection of the law". Specifically, "equality before and under the law" was intended to ensure that the courts would review both the content of the law and the way it is interpreted.[2] Under the Charter the court's scope of review is no longer limited to the procedural matter of how the law is administered.[3] Courts are now empowered to review the content of legislation. They may therefore judge a provision's substantive, as well as its procedural equality. Similarly, the express inclusion of "equal benefit of the law" was intended to reverse the Supreme Court's distinction under the Bill of Rights between "burdens" which were subject to review under s. 1(b) and "benefits" which were beyond its purview.[4] The wording of s. 15 and its four equality clauses make it abundantly evident that the drafters intended to cover every conceivable operation of the law.

What is not so evident is how the courts will read s. 15 and what interpretation it will place on the crucial concept of "equality". Many interpretative issues arise under s. 15 and we can expect that the government's argument in relation to them and its preferred interpretation will vary according to the context in which s. 15 is raised. When compliance with s. 15 is invoked as a justification, under s. 1, for government activity restricting

freedom of expression, the government can be expected to favour an expansive view of s. 15: the wider the obligation s. 15 imposes the more restrictions on freedom of expression which can be justified under it. Alternatively, a restrictive view of the section's requirements will be advocated when the government is charged with non-compliance with s. 15. When s. 15 operates as a source of potential liability the government can be expected to claim a narrow scope for s. 15 in an attempt to escape that liability.[5] With this in mind the terms of s. 15 will now be studied in greater detail.

The wording and structure of s. 15 raise the question of how many types of equality are protected. In its current form it could protect anywhere from one to four separate types of equality rights.[6] The first possible interpretation is that s. 15 guarantees one broad right to equality and the listing of specific types of equality was to promote a large and liberal construction of this section and to escape some of the strictures of the Bill of Rights jurisprudence. A second approach posits that s. 15 protects two separate rights: "equality before and under the law" and a second right of "the equal protection and equal benefit of the law". A different grammatical construction supports a third possibility; that s. 15 protects three types of rights: "equality before and under the law", "equal protection of the law" and the "equal benefit of the law". The last interpretation posits that four separate rights exist: "equality before the law", "equality under the law", "the right to equal protection of the law" and "the right to the equal benefit of the law".[7]

A consequence of adopting the second, third or fourth approach is that a person invoking s. 15 would be required to pinpoint the relevant category of inequality and the tendency would be for the law to give each category a separate meaning. This would result in a more technical interpretation of s. 15 and opens up the theoretical possibility that the stated categories would not cover all types of inequality. Dividing s. 15 into separate categories of equality is supported by the title of "Equality Rights" under which they fall. The plural suggests that more that one right is intended, but this approach may unduly narrow the promise of s. 15. It is more likely that the courts will read s. 15 as establishing a broad, multifaceted protection for equality rights, where the stated types of inequality are mere examples of a larger general principle. This approach appears to be more in keeping with the spirit of the Charter and its promise of improving the legal and political status of groups which are now subject to discrimination.[8] We will therefore talk of s. 15 as if it establishes one broad right to equality, without having to differentiate whether particular issues involve equality before the law, equality under the law, the right to equal protection of the law or the right to the equal benefit of the law. This interpretation also opens up the possibility that the Charter protects equality rights beyond those enumerated in s. 15.

B. The Definition of Equality

Equality is the crucial concept under s. 15. As the Charter leaves equality undefined, its content and parameters will be judicially determined. The courts will be called upon to choose between different conceptions of equality. These different conceptions of equality include a view of equality

which is satisfied by identical treatment, a second view which requires the removal of all legal impediments to provide equality of opportunity, a third view which also bases its discussion in terms of equality of opportunity, but which goes on to argue that providing equal opportunities may necessitate affirmative action in an attempt to bring historically disadvantaged groups up to the same starting line and a fourth conception which requires equality of results.

In Canadian human rights legislation "equality" has been consistently interpreted to require more than identical treatment. A good example is the decision taken by the British Columbia Human Rights commission in Tharp v. Lorex Mining Corp.[9] In that case Ms. Tharp complained that the company discriminated against its female employees by failing to provide separate toilet and shower facilities for women in the mining camp in which she worked. The defendant company argued that it did not discriminate as the female and male employees had the same right to use these facilities. The Board of Inquiry rejected the company's argument and held that identical treatment is not necessarily equal treatment. The law recognizes that sometimes people must be treated differently in order to provide equal treatment,[10] and it is therefore unlikely that s. 15 can be satisfied merely by providing identical treatment.

It is equally unlikely that the courts will require equality of results under s. 15. Such a standard is difficult to administer and may be too great an incursion into the legislative sphere. Although it has been argued that the phrase "equality before and under the law" was chosen to show an intention to

require equality of outcome, and not merely equality of opportunity or equality of treatment,[11] there is little other support for this concept, either in s. 15, the rest of the Charter or our socio-political traditions. While it is doubtful that equality of results will be chosen as the operative definition of equality under s. 15 it is not entirely irrelevant as the presence of unequal levels of attainment may constitute evidence of systemic discrimination.

Section 15's requirement of equality will therefore go beyond identical treatment but probably not as far as requiring equal outcome. The intermediate standard of equal opportunity is consistent with human rights jurisprudence, the terms of s. 15, the spirit of the Charter and our socio-political traditions and will probably be the operative standard. There are, however, two variations on equal opportunity and the court's interpretation of opportunity will determine the breadth of equality rights.

C. Discrimination

Another matter which must be discussed is the interrelationship between s. 15 and the concept of discrimination. Discrimination occurs when a distinction is made about a person on the basis of group characteristics, unrelated to individual merit.[12] Although s. 15 explicitly refers to discrimination its effect on s. 15's scope and requirements remain, as yet, unclear. There are three main issues which will effect the use of s. 15 both as a justification for restricting free expression and as a potential source of government liability. First, must there be proof of discrimination to breach s. 15; second, on the assumption that some proof of discrimination is required, what is the relevance of the presence or absence of an intention to discriminate;

and third, does s. 15 merely prevent discrimination on the grounds it enumerates, race, national or ethnic origin, colour, religion, sex, age or mental or physical disability? Or are unstated categories also protected?

a) Proof of Discrimination

The first issue concerns the necessity of proving discrimination to establish a breach of s. 15. Three approaches have been suggested. First, it is arguable that no proof of discrimination is needed to establish a breach of s. 15. Of the three alternatives to be discussed this approach involves the widest view of s. 15 and is based on the assumption that inequality may encompass some forms of treatment that cannot be classified as "discrimination".[13] Such a reading of the wording of s. 15 is possible. It may, on the other had, require equality before and under the law, its equal benefit and protection and separately proscribe discrimination. On this reading of s. 15(1), "without discrimination" does not modify the equality rights; with the result, by way of example, that there could be a breach of equal protection of the law without proof of discrimination.[14] This approach received some support under the old equality section in the Canadian Bill of Rights[15] and is consistent with the historic treatment of civil liberties in Canada where proof of discrimination is unnecessary.

A breach of a civil liberty is established once one shows that the protected right has been infringed. A good example is where a person claims that his freedom of expression has been restricted; he need only prove the restriction to establish a breach, he need not go farther and show that the restriction arose from treating him on the basis of group characteristics. The

civil liberties approach can be compared with that found in human rights legislation where proof of discrimination is generally required. As the purpose of human rights legislation is to protect minority groups, a breach requires that an individual be treated according to his group identification. Minority status and group affiliation are integral aspects of the complaint. In its current form, s. 15 shares aspects of both the civil liberties and human rights traditions and deciding which was intended has a direct bearing on the need for proof of discrimination.

The second approach posits that proof of discrimination is required in all cases under s. 15(1). Grammatically this interpretation is supported by the argument that "without discrimination" is a limitation on all the equality rights protected by the subsection's opening words. Therefore, a breach of equality before the law, equality under the law, equal protection of the law and equal benefit of the law all require proof of discrimination. Proponents of this approach argue that this result is consistent with the intent of s. 15, which they see as an example of human rights legislation in a constitutional context.

A third approach requires proof of discrimination only where the alleged breach involves the equal protection and benefit of the law. On a strictly grammatical reading of s. 15, it may be possible to argue that a breach of equality before and under the law is possible without proof of discrimination[16] if the opening words "every individual is equal before and under the law" are read separately from the remainder of the section. These therefore become free

standing rights and are treated differently than the equal protection and benefit of the law.

There is no jurisprudence indicating which approach is likely to find favour with the courts. This issue was raised and discussed to illustrate that it may be possible to breach s. 15 either in whole or in part, without any discrimination at all. If this is the case a heightened awareness and acute sensitivity to possible examples of inequalities in broadcasting policy would be necessary.

b) An Intention to Discriminate

Assuming that some proof of discrimination is required the second major issue is whether an intention to discriminate is a necessary component of s. 15. Most relevant factors suggest that an intention to discriminate is unnecessary. Historically there has been a shift away from the actor's intention to a greater emphasis on how the action effects the victim.[17] The law no longer requires an evil motive behind discriminatory acts. The current emphasis is on the treatment accorded minority groups. The result has been a growing recognition that discrimination can be unintentional and that apparently neutral provisions may have discriminatory effects. In both cases, if the Charter is to fulfill its purpose of helping to ameliorate disparities between the majority and minority, the result of an action must be more important than the intention which motivated it. The effect on minorities supercedes the intention of the majority. By not requiring an intention to discriminate s. 15 can be directed against government activity which has a

disproportionate or disparate impact on protected groups. The focus on effects means that s. 15 also prohibits systemic discrimination.

Arguably, the difficulty of proving an intention to discriminate is one reason not to require it as a component of s. 15. While this difficulty is particularly acute where the discrimination is systemic, it is equally true of individual acts of discrimination as motives may be masked or mislabelled.

Jurisprudence under provincial human rights legislation generally does not require an intention to discriminate. A line of cases holding that an intention to discriminate was not necessary, was recently called into question by two cases.[18] In O'Malley v. Simpson Sears Ltd.[19] the Ontario Court of Appeal, in construing the Ontario Human Rights Code, held that an intention to discriminate is required. For religious reasons, O'Malley could not work on Saturdays although her employer required her to do so. The intention of the employer's policy was not to discriminate against her, but its consequences had that effect. Similarly, the Federal Court of Appeal in Bhinder v. Canadian National Railway required an intention to discriminate. Bhinder, for religious reasons, was unable to wear the hard hat required by his employer, with the effect that he lost his job. Regardless of this consequence the court held that there was no discrimination.

These decisions are under appeal to the Supreme Court of Canada and boards and tribunals have been reluctant to follow their holdings.[20] These decisions were not followed in Saskatchewan Human Rights Commission and Huck v. Can. Odeon Theatres Ltd.[21] In that case, the Saskatchewan Court of Appeal found

that a theatre had discriminated against a wheelchair bound person by allowing him access to a theatre but only provided viewing space in front of the rest of the theatre seats. While the company had argued that it had not acted in a discriminatory manner because they had treated Mr. Huck in the same manner as they had other patrons, the Court disagreed. They held that:[22]

> "The treatment of a person differently from others may or may not amount to discrimination just as treating people equally is not determinative of the issue. If the effect of the treatment has adverse consequences which are incompatible . . . by restricting or excluding a right of full and equal recognition and exercise of those rights it will be discriminatory."

On balance, it appears that an intention to discriminate should not be necessary for a breach of s. 15. While this may initially appear harsh, any accommodation this principle may require can be effected under s. 1 when the courts determine whether a breach of a provision like s. 15 is reasonable, prescribed by law and justifiable in a free and democratic society.

c) Unstated Categories of Discrimination

The third issue is whether s. 15 prevents discrimination on grounds that it does not expressly delineate. It is generally recognized that the grounds of discrimination expressly prohibited by s. 15 are not exhaustive of its protection. The wording of s. 15 supports this interpretation due to the presence of "in particular" before the stated categories of prohibited discrimination. This leaves room for the argument that s. 15 also grants equality rights on the basis of unstated categories but it has been suggested that these

unstated categories must bear some similarity to the ones expressly outlined. More specifically, the courts may inquire whether a group claiming under an unstated category in s. 15 has received other statutory protection against discrimination, has been subject to a pattern of discrimination: whether the major characteristic defining the group is not easily changed by the individual whether the groups is a discrete and cohesive class.[23]

Types of discrimination not within any of the stated categories (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) may, however, receive less legal protection and less rigorous judicial scrutiny. According to the rule of statutory construction that a legislature is not presumed to speak in vain, some significance should be given to the fact that certain categories of discrimination are expressly mentioned, whereas others are not. Consequently, it will be more difficult, though not impossible, to establish a breach of s. 15 when relying on an unstated category of discrimination. It may also be easier for the government to justify any such discrimination under either s. 15 or s. 1.

The previous discussion shows the far reaching effects of even the most circumscribed reading of s. 15. It may therefore be possible to justify restrictions on freedom of expression where there is inequality without discrimination, discrimination without intention or discrimination on the basis of an unstated category. Similarly, the government would then be subject to obligations of an equivalent intensity: its actions could be contrary to the Charter even if there was no proof of discrimination, no intention to discriminate, or no expressly mentioned group effected.

D. Judicial Remedies and Affirmative Action

The extent of the government's obligation under s. 15 is unclear. While there is no doubt that s. 15(2) allows the government to voluntarily promote equality principles, there is some debate over whether s. 15(1) requires the government to do so. Section 15(1) obviously prevents the government from discriminating but it may impose a positive obligation to actively promote and protect equality rights.

The government would not only be required to refrain from passing discrimination legislation or engaging in discriminatory actions; it must act affirmatively to achieve the Charter's goal of protected rights and fundamental freedoms. This approach involves a view of the Charter which goes beyond viewing its provisions as mere statements disallowing certain prescribed forms of discrimination. If this view is correct the Charter imposes two types of obligations governments: an obligation not to discriminate and an obligation to affirmatively act to promote guaranteed rights and freedoms, each obligation to be enforced by different judicial remedies. A breach of a positive obligation might involve a form of innovative relief which would be a judicial requirement that the government adopt and implement a program of affirmative action. In this sense the government's obligation to protect human rights and fundamental freedoms would be specifically enforced.

The United States has experience with the positive nature of governmental obligations and the legal modalities of their enforcement. Different types of injunctive relief have been employed in American courts as remedies for

infringements of constitutional protections under the U.S. Bill of Rights. In addition to the traditional preventative injunction, which prevents the breach of an obligation not to do, the courts have used the reparative injunction. It[24]

> "requires that positive steps be taken by the defendant to repair the effects of past wrongs or to carry out some affirmative legal duty. In the constitutional setting, the reparative injunction is typically designed to correct the effect of past wrongs.

At the present time we have no way of knowing whether or not the Canadian courts will exercise a similar jurisdiction but the outcome depends on whether they accept both of two legal arguments: first, that the Charter imposes some positive obligations on the government and second, that a breach of those obligations is properly redressed by a remedy like the reparative injunction.

The nature of the government's obligation was questioned and explored recently by certain academics. Professor Bender asks:[25]

> "Will the individual constitutional rights newly created by the Canadian Charter be predominantly negative in nature, as is true under the U.S. Constitution or will the Charter be read as establishing some significant constitutional entitlements as well?"

In his view a provision such as s. 15(1) will "immediately or ultimately" be read in a manner which establishes such entitlements.[26] If his view is correct, it may be possible to argue that governments are under an obligation

to enact legislation or take other steps to ensure that the guarantees provided in s. 15(1) will, indeed, become reality. For instance, where gender inequality is found to exist owing to the manner in which women are portrayed in the broadcast media, the government may have the positive obligation to legislate to ensure that this particular inequality is eliminated. If such measures are not undertaken voluntarily, then courts may impose such an obligation on the government. Another writer agrees:[27]

> The interest of minorities and the politically powerless can hardly be protected if the court refuses to do more than act in a negative way, only striking down measures which constitute an illegitimate attack on such interests. Affirmative measures may be required, particularly where the constitution makes affirmative promises.

Professor Dale Gibson shares a similar view, arguing that section 15 establishes a "positive right" to "equal benefit of the law". This is in addition to:[28]

> "a legal obligation on the part of the government to ensure that those who do not enjoy equal benefits because they are members of groups that have been disadvantaged because of past discrimination designed to erase that historic advantage and place members of the group on a truly equal footing with other members of society."

He notes there is not much difference between an obligation to prevent discrimination and an obligation to promote equality if the obligation extends to preventing systemic discrimination.[29]

A review of the relevant legal literature, especially under s. 15, suggests that there is some room for the imposition of positive obligations upon the government. This alone, however, will not mean that reparative injunctions against the government will become commonplace. The courts must also be convinced of the propriety of such injunctive relief.

While the strict legality of injunctive relief against the Crown has been the subject of voluminous legal literature, the prevailing opinion is that injunctions may be issued against the Crown. But while injunctions may constitute a possible legal remedy, it can be expected that they will not be a common one. Our tradition of parliamentary sovereignty and the judicial reluctance to actively dictate and subsequently police government action explains the judicial reluctance to specifically enforce the government's positive obligations. Professor Gibson states that:[30]

> "Canadian courts . . . somehow regard it as less intrusive to tell the government that it may not pass a particular law or pursue a specific line of action, than to tell it what law should be enacted or what line of action should be taken."

This anticipated reluctance mirrors the American experience where reparative injunctions are generally viewed as a "last resort", where other remedial measures have failed.[31]

E. The Impact of Section 28

Section 15 establishes equality rights for individuals within stated and unstated categories of protection. The scope of s. 28 is more particular; it provides that all other Charter Rights are guaranteed to men and women equally. The right to free expression is therefore to be enjoyed equally between men and women.

While there are many legalistic arguments concerning the section's scope and implications, there is no doubt that rights to sexual equality were intended to enjoy an elevated status. It is arguable that sexual equality occupies a pre-eminent position in the Charter; that it is not to be balanced against other Charter rights and perhaps, is even beyond the purview of the government's power to enact discriminatory legislation if it states that its legislation will operate notwithstanding the Charter under s. 33.

F. Sex-Role and Other Types of Stereotyping

The relevance of s. 15 to broadcasting policy can be explained and illustrated in the context of programming which contains sex-role or other types of stereotyping. Regulations against stereotyping could be argued to be a justified restriction on freedom of expression because they protect someone's competing equality rights. On the other hand, the absence of regulation and the widespread broadcasting of stereotypic images may constitute unconstitutional discrimination. Arguments can be made against stereotyping on the basis of sex, race, age, national or ethnic origin, subject to the caveat that sex role stereotyping may stand on a special level due to the added protection of s. 28.

Limitations on expression which contain stereotyping can be justified under all three justifications we discuss. They may fall within the policy of balance in broadcasting; to the extent that these images present and perpetuate social imbalance they unfairly represent only one side of the issue. Stereotypes may also harm the targeted groups. The harm which may result may be plotted on a continuum with positive representations on one end and negative images on the other. In the case of racial stereotyping the furthest point on the negative end of the continuum is hate propaganda. Similarly, at the negative end point on the spectrum of sex-role stereotyping is criminal obscenity. Sex-role stereotyping is also amenable to analysis under the conservative, liberal and feminist philosophies. The third justification of preservation of equality rights may also be said to apply. We will use sex role stereotyping to explain how the equality arguments apply in this context as this topic has received more attention than the other forms of stereotyping. A similar analysis can be applied in relation to other types of stereotyping.

In 1979, a task force was appointed by the CRTC, at the request of the Minister of Communications, to examine the problem of sex-role stereotyping in broadcasting and to recommend ways in which it could be eliminated. The task force concluded that the problem of sex-role stereotyping in the media was one of inequality and injustice.[32] The task force focussed on the representation of women in broadcasting and the effects of that representation. Numerous studies concluded that the media do not portray women and men as equal, and as

equally capable human beings.[33] The Nova Scotia Status of Women Task Force report stated:

> [T]he image of women as portrayed not only in advertising but also in programming more often than not represents the damaging and inaccurate stereotype that is prevalent in our male-oriented society.[34]

The CRTC Task Force also commented on the pervasiveness of stereotyping in Canadian media. There was one recurrent theme in both the submissions received by letter and those presented at the public meetings: that what is seen on television and heard on radio does not reflect adequately the realities of Canadian society.[35]

The task force found that the cumulative effect of sex-role stereotyping tends to influence attitudes generally, with the negative effect of limiting women's choices both socially and professionally. These conclusions reflect findings of scholarly studies on the subject which concluded that sex-role stereotyping harms women by denying them equal rights.[36] The task force recommended that a two year period of self-regulation by the relevant industries take place and be reviewed in the fall of 1984.[37]

Mediawatch, a group formed in response to the Report of the Task Force on Sex-Role Stereotyping, undertook a study to investigate sex-role stereotyping and sexist content to measure any change during the self-regulatory period. The results of the Mediawatch study revealed "very little perceptible progress has been made to decrease sexism in the media. . . . On the whole . . . the

media still paints a disturbingly narrow and false mural of women in society".[38]

Canadian policy as expressed in the Charter of Rights and Freedoms and in government reports such as the Royal Commission on the Status of Women, Towards Equality for Women, and Images of Women in Broadcasting indicate that the government is committed to equal opportunities and programs for women and that specific changes to legislation, policies and programs will be required to achieve this goal.[39] If these initiatives involve a conflict with freedom of expression, the harm to the concept of equality will be weighed in the balance against harm to freedom of expression. The need for balance in broadcasting will lend weight to the argument that the limitation is "demonstrably justified" under s. 1. Sex-role stereotyping will have to be sufficiently well defined to meet the requirement "prescribed by law" in s. 1 of the Charter and the harm of sex-role stereotyping to the equality of women will have to be proven on the balance of probabilities. The Broadcasting Act appears to be is sufficiently broadly worded to allow the CRTC to make regulations addressing the unequal aspects of stereotyping.

FOOTNOTES

1. We will see that because of s. 15(2) the government may voluntarily chose to promote equality rights in its broadcasting policy, without infringing the Charter. The issue, however, is whether the courts can force the government to promote equality.
2. Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131 at 137.
3. This limitation under the Canadian Bill of Rights finds its roots in A.G. Can. v. Lavell, [1974] S.C.R. 1349. In finding that a section of the Indian Act (providing that an Indian woman who married a white man lost her Indian status, while an Indian man who married a white woman did not) did not contravene s. 1(b) Ritchie defined "equality before the law" as "equality of treatment in the enforcement and application of the laws". See also A.G. Can. v. Canard, [1970] S.C.R. 282.
4. Bliss v. A.G. Can., [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 92 D.L.R. (3d) 417.
5. In attempting to escape liability the government will claim that s. 15's requirements were not breached and alternatively that if a breach of s. 15 occurred it could be justified under s. 1 as a reasonable limitation, prescribed by law, which is reasonably justified in a free and democratic society.
6. Attorney General, Province of Ontario, "Sources for the Interpretation of the Equality Sections" at 200 et seq.
7. Ibid.
8. Ibid., at 206.

9. Tharp v. Lornex Mining Co., B.C. Human Rights Board of Inquiry, 1975.

10. Patricia Hughes, "Discrimination and Related Concepts: Definition and Issues" in Equality in Employment: Research Studies, Royal Commission Report, Ottawa, 1985 215 at 224.

11. Mary Jane Mossman, "Gender, Equality and the Charter" in Equality in Employment, id., 297 at 301.

12. Bhinder v. Canadian National Railways (1981), 2 C.H.R.R. D/546 rev'd (1983), 48 N.R. 80. There is some debate whether the distinction must be adverse to the individual before it can qualify as discrimination. None of the jurisprudence expressly require adverse impact but it may constitute an implicit modifier. This issue is unlikely to cause much hardship because an individual will generally have been the victim of adverse action to motivate a legal challenge. It has also been suggested that if there is a requirement of an adverse distinction it is satisfied by an affront to the individual's dignity, thereby creating a very large category. See A.G. Ont., supra, n. 6 at 236.

13. A.G. Ont., supra, n. 6 at 219.

14. Ibid., at 219.

15. Curr v. The Queen, [1972] S.C.R. 889, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603. Chief Justice Laskin explained s. 1 of the Bill of Rights in the following terms:

> . . . The existence of any forms of prohibited discrimination [is not] a sine qua non of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend section 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to section 1 if it is violative of what is specified in any of the clauses (a) to (f) of section 1.

It is, a fortiori, offensive if there is discrimination by reason of race so as to deny equality before the law.

16. Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Sup. Ct. L. Rev. 131 at 145.
17. Walter Tarnopolsky, Discrimination and the Law (1982) 1 et seq.
18. Kalsa v. Associated Toronto Tax-Cab Co-op (1980), 1 C.H.R.R. D/167; Singh v. Workmen's Compensation Board (1981), 2 C.H.R.R. D/459; Colfer v. Ottawa Board of Commissioners of Police (Ontario, 1979).
19. (1980), 2 C.H.R.R. D/267.
20. A.G. Ontario, supra, n. 6 at 255.
21. (1985), 6 C.H.R.R. D/2682.
22. Ibid., at D/2689.
23. A.G. Ontario, supra, n. 6.
24. Robert Sharpe, "Injunctions and the Charter" (1985), 4 Osgoode Hall Law J. 474 at 476.
25. Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights" (1983), 28 McGill Law Journal 811, at 823.
26. Ibid., at 823.
27. R. Sharpe, supra, n. 24 at 484.
28. Dale Gibson, "Remedies and Equality", paper presented at the National Symposium on Equality Rights, Toronto, January 1985 at 25-26.
29. Ibid., 26.
30. Ibid., at 12.
31. Supra, n. 24 at 476. Courts are reluctant, generally, to order such injunctive relief, for it requires courts to "immerse themselves in the

details of the organization and administration of important public agencies".

32. Canada, Images of Women, Report of the Task Force on Sex-Role Stereotyping in the Broadcast media.

33. Ibid., at 4.

34. Nova Scotia Status of Women, "Herself", Status of Women Task Force Report (1976), cited in Images of Women, ibid., at 4.

35. Lucy Kimisar, "The Images of Women in Advertising", in Women in Sexist Society and Studies in Power and Powerlessness (1971).

36. For e.g., see A. Courtney and T. Shipple, Canadian Perspectives on Sex Stereotyping in Advertising (Ottawa: Advisory Council on the Status of Women, 1978).

37. Canadian Associations of Broadcasters "Private Broadcasting Voluntary Guidelines Sex Role Stereotyping" complied the following:

    1. Broadcast programming should reflect an awareness of, and sensitivity to the problems related to sex role stereotyping.

    2. Broadcasters should recognized the changing interaction of men and women in today's society.

    3. Broadcasting should reflect a contemporary family structure showing all persons as equally supporting participants in home management and household tasks, and as equal beneficiaries of the positive attributes of family life.

    4. Broadcasters should reflect the wide spectrum of Canadian life, portraying people of various ages, backgrounds and appearances, actively pursuing a wide range of interests.

    5. Broadcasters should refrain from the exploitation of men and women, and reflect the intellectual and emotional equality of both sexes, in programming.

6. Broadcasters should exercise their best efforts to use language of an inclusive nature in their programming, by avoiding whenever possible expressions which relate only to one gender.

7. Broadcasting should reflect a realistic balance in the use of men and women as voice overs and as experts and authorities.

8. Broadcasters should attempt to increase the visibility and involvement of women in broadcasting, both on and off the air.

9. Broadcasters should exercise sensitivity to and be aware of the problem of sex role stereotyping in the acquisition of programming material or rights.

10. Broadcasters should support the voluntary initiatives of the advertising industry in relation to the issue of sex role stereotyping, through the Advertising Advisory Board, and that wherever possible, broadcasters should cooperate with locally organized and nationally conducted campaigns of the Advertising Advisory Board (AAB).

38. Mediawatch Inc., Brief to the Task Force on Broadcasting, August 19, 1985.

39. Supra, note 32.

6. COMMERCIAL SPEECH: ADVERTISING AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Introduction

In this section we discuss freedom of expression in advertising. For constitutional law purposes advertising is often called commercial speech. It involves business advertisements which solicit or give information on a proposed commercial transaction.[1] Commercial speech differs from other types of speech because the speaker has a predominantly financial interest in its distribution.[2]

Different forms of advertising are currently subject to various controls under general federal and provincial statutes, specific broadcast statutes and voluntary advertising guidelines. Federal restrictions on broadcast commercial speech include provisions under the Combines Investigation Act,[3] The Food and Drug Act,[4] The Criminal Code,[6] The Trademarks Act[7] and the Copyright Act.[8] Certain provincial acts regulate unfair business of trade practices and/or provide consumer protection. In addition, the Broadcasting Act and Regulations specifically regulate commercial messages on radio and television. The CRTC may require a station or network operator to modify the character of any advertisement where, in its opinion, the advertisement is of an offensive or objectionable nature. Commercials promoting beer, wine, cider, food, drugs, cosmetics and medical devices are subject to prior review by a CRTC committee. Pre-clearance is also required for all broadcast advertising directed towards children.[9] While voluntary industry guidelines such as the

Telecaster's Committee Guidelines and the Commercial Acceptance Policies of the C.B.C. affect the content of broadcast advertisements, they are not imposed by the government, and consequently do not raise freedom of expression issues under the Canadian Charter of Rights and Freedoms.[10]

It is both necessary and appropriate to discuss commercial speech in a separate section. Although the same general Charter principles and justifications for restricting expression apply, there is the important threshold issue of whether or not commercial speech is even a protected part of "freedom of expression". Although there are few Canadian cases, a review of the relevant American jurisprudence illustrates the approaches open to a Canadian court, explains the factors which inform the debate and shows the manner and extent in which commercial speech is limited in another "free and democratic" country. In dealing with this threshold issue, we canvass the different ways American courts have treated commercial speech under the First Amendment. At first all forms of advertising were thought to be outside constitutional protection. Ten years ago the American Supreme Court revised its position and conferred limited constitutional protection on commercial speech. We rely upon the American experience and conclude that commercial speech will fall within "freedom of expression" in s. 2 of the Canadian Charter.

In the second part of this chapter we outline the level of protection freedom of commercial expression is likely to enjoy by examining when a limitation on commerical expression will be upheld under s. 1 as reasonable, prescribed by law, and justifiable in a free and democratic society. Differences between political speech and commercial speech suggest that

restrictions on commercial speech will not be as rigorously scrutinized as those affecting political speech. We predict the American trend to give less protection to commercial speech will be mirrored in Canadian decisions by a finding that the government has discharged the burden of proof imposed by s. 1.

In the third part we outline justifications which can be advanced, under s. 1, for limiting certain forms of commercial expression. As in the other chapter of this paper, we emphasize justifications based upon balance in broadcasting, the harm which may result if some forms of expression are unregulated and the harm to equality principles which may result if some forms of expression are unregulated. We discuss each justification, the type of evidence required to justify limitations on commercial speech and the relationship between its level of protection and the manner in which it is controlled.

B. The Constitutional Protection of Commercial Speech

a) American Jurisprudence

At first, and for a long time, American courts denied any constitutional protection to commercial speech. In Valentine v. Chrestensen,[11] the American Supreme Court upheld a statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." Further support for a "commercial speech" exception to the First

Amendment is found in Breard v. Alexandria,[12] where the same Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. The Court reasoned: "The selling . . . brings into the transaction a commercial feature". Moreover, the Court several times has stressed that communications to which First Amendment protection was given were not "purely commercial."[13]

The United States Supreme Court revised this position in 1976 and gave constitutional protection to purely commercial speech in Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council[14]. While other cases indicated the Supreme Court was moving in this direction, this case finally settled the matter.[15] Concerned consumers attacked a prohibition against advertising the price of prescription drugs in the State of Virginia. They argued that the First Amendment protection of free speech gave them the constitutional right to receive price information on prescribed drugs. While it may have been suggested that the plaintiffs were asserting an interest in their own health, an interest which may be more fundamental than a trade consideration, the court expressly characterized the legal issue as dealing solely with commercial speech.[16]

Despite previous authority, the Supreme Court gave First Amendment protection to commercial speech. The court did not accept the proposition that only commercial speech with value as public information should receive protection: it was swayed by the difficulty of drawing and maintaining any meaningful difference between commercial speech with value as public information and commercial speech which lacked value as public information.[17] The

U.S. Supreme Court therefore chose a consumer's right to information over the legislature's attempt to ban advertising "in the public interest".

Consumer protection was also a factor in the subsequent case of Central Hudson Gas & Electric Corp. v. Public Service Commission.[18] The Supreme Court declared a New York law unconstitutional because it banned advertising which promoted energy use during the energy crisis. The Court protected commercial speech because of its informational value and announced the following four pronged test for the purposes of constitutional review:[19]

> For commercial speech to come within [first amendment] protection, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

This test requires the court to balance interests in deciding if restrictions on commercial speech can be justified.[20] After this decision the appropriate level of protection for commercial speech became more important than the threshold issue of whether commercial speech is constitutionally guaranteed.[21]

Despite these decisions there is still some academic support for denying constitutional protection to commercial speech. In the United States the debate on the appropriate constitutional status of commercial speech has at its foundation different evaluations of its worth. Those arguing for protection

claim that the rationale for protecting freedom of expression applies equally, albeit with less urgency, to commercial expression. According to this view commercial speech is required to support democracy, promote truth through a free marketplace and to create opportunities for personal fulfillment, despite its predominantly economic motivation.[22] The free flow of information and the recipient's right to know are seen as necessary to a democracy with a capitalistic economy. In Virginia Board of Pharmacy the American Supreme Court reasoned that advertising is:[23]

> . . . indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.

The same court in Bigelow v. Virginia[24] outlined its assessment of the relationship between commercial speech and the marketplace of ideas:

> . . . the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

While commercial speech may not contribute to "an interchange of ideas" in the same manner as some other speech, it arguably provides information relevant to public and private decision-making.[25]

On the other hand, others do not accept that limitations on commercial speech threaten the values protected by a constitutional guarantee of free expression. They question whether the government's legitimate but limited interest in advertising warrants constitutional protection. They believe advertising contributes to economic efficiency and increases consumer opportunities but they argue that these characteristics do not compensate for its failure to contribute to self-government or nurture personal fulfillment; key values behind constitutional protection for freedom of expression.[26] Despite this debate among academics, the American judiciary has given limited constitutional protection to commercial speech.

b) Canadian Law

We expect a similar tension in Canadian thought on the value of commercial speech and a similar judicial resolution: we predict Canadian courts will also give limited constitutional protection to commercial speech. Two main considerations support this prediction. First, the wording in s. 2 covers any means of communication or expression, including commercial speech. Second, there is no good reason to differentiate between types of expression under s. 2. Any such differentiation would be both artificial and difficult,[27] would have the unjustified effect of creating broad categories of speech outside the Charter's protections and would be unnecessary in light of our judiciary's power to determine that selected legislation is a reasonable limitation on commercial speech under s. 1. A major reason why American courts did not grant constitutional protection to commercial speech for so long was their fear that once the floodgate of protection was opened there would be no way to stop

advertising on "undesirable" but legal products. Canadian courts need not be affected by this fear due to their powers to nuance under s. 1.[28]

The academic tension and judicial trends of American law are already present in the few Canadian cases which have commented upon commercial speech. In the pre-Charter case of Jabour v. The Law Society of British Columbia[29] the appellant unsuccessfully argued that the Law Society's prohibition against the particular form of advertising in which he was engaged infringed his freedom of expression. The Supreme Court decided that the Law Society could define and prohibit the type of advertising used by its members. Although the case was decided on the division of power between the province[30] and the federal government,[31] Mr. Justice Estey recognized a limited right to free commercial expression, but upheld the province's right to curtail it.[32] He emphasized that freedom of expression is not absolute[33] and expressly distinguished between political speech and commercial speech in the following terms:

> "The freedom of expression with which the Court is here concerned of course has nothing to do with the elective process and the operation of our democratic institutions, the House of Commons and the provincial legislature. We are indeed speaking about the right of economic free speech, the right to commercial advertising."[34]

Post-Charter Canadian cases are somewhat divided on whether commercial speech should be protected under s. 2. A few cases suggest s. 2 does not extend to commercial speech. In Re Klein & L.S.U.C.[35] Mr. Justice Callaghan denied constitutional protection to economic speech. He explained:[36]

> "Simply because commercial speech involves an expression does not mean that it must, somehow, be accounted for under s. 2(b). In my view, this is to confuse form with substance. Pure commercial speech mimics political speech in form (both involve an expression), but not in substance or function. Commercial speech flows from the realm of economic activity; political speech from that of politics and government. In a democratic society the economic realm must be subordinate to the political realm."

He concluded:[37]

> "I would conclude that there is no reason to expand the meaning of the word 'expression' in s. 2(b) of the Charter to cover pure commercial speech. Commercial speech contributes nothing to democratic government because it says nothing about how people are to govern or how they should govern themselves. It does not relate to government policies or matters of public concern essential to a democratic process. It pertains to the economic realm and is a matter appropriate to regulation by the Legislature."

This approach was also adopted and applied as the first reason for judgment in the subsequent case of Grier v. Alberta Optometric Association.[38] As a secondary ground the Alberta court upheld the impugned legislation under s. 1 of the Charter. The plaintiff argued that the Association's bylaw, which prohibited the advertisement of fees, contravened the Charter's guarantee of freedom of expression. The court rejected the contention that s. 2 protects commercial expression or guarantees a consumer's right to know. This part of the judgment may be criticized as it was partly based on an unwarranted extension of certain remarks of the dissenting judgment of Mr. Justice Dickson

in Gay Alliance Towards Equality v. Vancouver Sun,[39] contains certain internal contradictions[40] and notes, but does not follow, the change in American law giving constitutional protection to commercial speech.

Those who hoped Canada would benefit from the American experience of an entrenched constitution may be disappointed by these decisions. They suggest Canadian courts may follow the old American approach and forestall the difficult inquiry of whether a restriction on commercial speech can be justified under s. 1, merely by refusing to acknowledge that commercial speech is part of "freedom of expression". A complete denial of constitutional protection to all forms of economic speech may become an attractive judicial conclusion when one evaluates the difficulties in balancing the competing rights and freedoms of advertisers, listeners and the government. The following remarks of Mr. Justice Callaghan substantiate this possibility:

> "But if commercial speech serves a function completely different from that associated with non-commercial speech; if its too-close association with political speech threatens to devalue the latter and the First Amendment; if it is of less moment; if it is entitled to less protection and to regulations formulated with less precision, than that to which non-commercial speech is entitled, then surely the question arises, why protect it at all?"[41]

A second line of Canadian cases grants constitutional protection to commercial speech. This approach is more consistent with the wording of s. 2 and the scheme of the Charter, where the broad rights granted under individual

sections may be narrowed under s. 1. While this authority is intrinsically more persuasive it also carries the approval of a Court of Appeal. In Re Law Society of Manitoba and Savino[42] the Manitoba Court of Appeal held that commercial speech was protected under s. 2. The relevant legislation prohibited the advertisement of lawyer's areas of practice and required the Law Society's prior review of advertisements containing more than certain basic information.[43] The majority upheld the legislation as a reasonable limitation under s. 1 and Mr. Justice O'Sullivan dissented on the grounds that the Law Society's proscriptions were too vague to comply with s. 1's requirement of limitations "prescribed by law". The court's treatment of commercial speech is interesting. Mr. Justice Monnin assumed s. 2 was breached, Mr. Justice O'Sullivan expressly recognized the need to give freedom of expression a wide ambit and Mr. Justice Huband endorsed O'Sullivan's statement that:

> "advertising in one's own publication or that of another is a mode of expression; that mode of expression is guaranteed under the Charter-."[44]

Similarly, in R. v. Halpert[45] the accused was charged under a provision in the Weights and Measures Regulations which prohibited gasoline retailers from offering, advertising or displaying gasoline for retail trade in other than metric units.[46] The Act did not make it an offence to sell gasoline in other than metric unit; only to advertise it for sale in other than metric units. The court was therefore asked to determine the constitutionality of an advertising restriction for a product it was perfectly legal to sell. Mr. Justice Ross canvassed the recent American jurisprudence and remarked: "The

Court is much impressed with the logic and reasoning of Mr. Justice Blackman (in Bigelow and Virginia State Board of Pharmacy) and makes a finding of fact that while the expression under consideration is a commercial one, that in itself is not sufficient to deny the expression the protection afforded by s. 2 of the Charter of Rights and Freedoms."[47] This case is strong authority that commercial speech falls within s. 2 as the government could not discharge the burden of proof under s. 1. This limitation on commercial speech was therefore struck down because it was unconstitutional.

Because of the wording of s. 2, the scheme of the Charter and the Savino and Halpert decisions, we expect Canadian courts to recognize commercial speech as part of s. 2's guarantee of freedom of expression. This result is preferable and more likely than a complete refusal to grant any constitutional protection to commercial speech.[48]

C. The Appropriate Level of Constitutional Protection for Commercial Speech

If commercial speech is protected under s. 2 any restriction qualifies as a prima facie breach of the guarantee of freedom of expression. When such a breach occurs the government must justify the restriction under section 1 if it is to be upheld. If the government can discharge this burden and justify its restriction, it would constitute a constitutionally valid limitation on freedom of expression. In deciding whether the requirements of s. 1 are met the court is called upon to balance competing rights and interests.

The government must first establish that its proposed limitation on a Charter right or freedom is reasonable. The limitation will be reviewed for

substantive and procedural reasonableness in both its statement and application. Although no conclusive test of reasonableness has yet emerged, courts appear to require that a limitation must be proportionate to its intended purpose and must serve a legitimate legislative goal. The balancing of interests will therefore take into account the importance of the infringed right, the extent of the infringement and compare these two factors with the importance of the government interest asserted by way of justification. In determining what is reasonable the courts will consider the type of justifications we discuss. Notably, in a recent decision the court based its decision on the question of reasonableness in the following terms:

(1) Is the object of the legislation a reasonable objective in the advancement of the common good?

(2) Is the legislative programme reasonably appropriate to the furtherance of the object of the legislation?

(3) Is the infringement reasonably necessary to the success of the legislative program?

(4) Is the infringement too great a price to pay for the presumed benefit to be obtained from the legislation?

These questions indicate the wide powers of judicial review our courts will use to balance rights and freedoms.

The government must also show that the limitation is prescribed by law. The "prescribed by law" requirement is intended to ensure that citizens know when, and to what extent, their rights and freedoms have been limited by government action. The mere existence of a statutory provision or regulation,

even if they contain a statutory standard, will not necessarily serve this notice giving function. A statutory or regulatory standard is not automatically "prescribed by law", it must therefore qualify for that status under a judicially defined test. The content of the statutory standard or regulation must be evaluated to determine whether it contains the appropriate level of specificity and foreseeability to be "prescribed by law". Any restrictions must therefore be sufficiently specific to qualify as "law". This will require careful drafting.

In attempting to fulfill s. 1's last requirement, that the limitation is demonstrably justified in a free and democratic society, the laws of other such societies are important. In relation to limitations on freedom of expression American case law under the First Amendment, of the United States Bill of Rights can provide assistance to Canadian courts. While the United States Bill of Rights does not contain a section comparable to s. 1, the United States Supreme Court has developed numerous doctrines to ensure that First Amendment protections are not restricted by governments without some justifications.

For present purposes we assume that restrictions on advertising have a legal basis and are sufficiently certain and foreseeable to meet the standard of "prescribed by law" established by s. 1. Our remaining discussion of commercial speech is based upon that assumption.

In this part we examine the approach courts can be expected to take to their determination of whether proposed restrictions are reasonable and justifiable in a free and democratic society. We deal generally with the

question of the appropriate level of constitutional protection for commercial speech and then specifically canvass what justifications can be alleged to support an argument that a proposed limitation is reasonable.

Two factors combine to suggest that commercial expression will not receive the same level of protection as some other forms of expression. First, differences between commercial speech and political speech will be relevant under s. 1 when the court decides if the government has established that a proposed limitation is reasonable and justified in a free and democratic society. Second, the unique characteristics of the broadcast medium make it especially subject to regulation in the public interest. American courts apply a low level of scrutiny to infringements on commercial speech. They often merely declare, without explaining, that certain types of advertising restrictions are proper, reasonable and justifiable, even though American courts have traditionally been reluctant to judge the content of constitutionally protected speech. Similarly, in the majority of the few relevant Canadian cases, our courts upheld the impugned legislation under s. 1.

In evaluating a restriction on commercial speech Canadian courts can be expected to use a purposive approach to Charter provisions. As "freedom of expression" historically dealt with free political speech, courts may be more willing to defer to the legislature's determination of a proper and justifiable limitation on commercial speech. Just as the value given to commercial speech determined whether it received constitutional protection, so too will its similarities and differences with political speech determine the level of constitutional protection it will be accorded. American decisions distinguish

between political and commercial speech to determine the extent of First Amendment protection each receives. In Virginia State Board of Pharmacy v. Virginia Consumer Council[49] Mr. Justice Blackman noted five distinguishing factors which were said to justify a less rigorous level of constitutional protection for commercial speech:[50]

> (1) The advertiser of commercial commodities and services has better access to the facts concerning his product than the media have to the facts in their news reports, which may be drawn from sketchy or conflicting sources.
>
> (2) The factual assertions in commercial advertising relate to tangible goods and services that are more susceptible to empirical testing by regulatory authorities than are representations made in news reports and editorials.
>
> (3) The importance of advertising in generating profits makes it less susceptible to the chilling effect of governmental regulation than news reporting and editorializing.
>
> (4) The advertiser of commercial commodities and services does not have to assemble the facts about his product under time pressure as do media distributors with publication deadlines for topical material.
>
> (5) Commercial speech has lower first amendment value than reports of news and expressions of opinion since commercial advertising generally makes no express contribution to the forum of ideas.

Other cases have raised the concern that a similar treatment of commercial and political speech may devalue the guarantee of free political speech.[51]

The greater objectivity of determining when commercial speech is inaccurate, its hardiness and pervasiveness make it less likely that restricting freedom of commercial expression would have the"chilling" effect of silencing a potential speaker.[52] This theme was repeated in Bates v. Arizona State Bar[53] where the American court noted that since commercial speech is motivated by economic self-interest it is a "hardy breed of expression". It has, however, been urged that the general hardiness and durability of commercial expression fade when considering commercial expression found in the media. It is claimed that:[54]

> The media are generally more vulnerable to the chilling effects of governmental regulation of advertising because they have less financial interest than advertisers in the distribution of any particular type of advertising and lack the advertisers' access to the facts about specific products and services. Because of the proportionally small revenue the media derive from any one line of advertising, they have little incentive to expend time and resources in screening potentially deceptive or illegal ads. Moreover, the potential loss to the media is quite large if they can be held responsible for the content of the advertising they distribute - particularly if they can be held liable for damages or can be made subject to an injunction barring the distribution of an entire publication or broadcast. To avoid potentially serious chilling effects, the media should not be subject to criminal penalties, damages, or injunctive relief for the dissemination of particular advertising absent a showing of at least negligence in distributing the offending advertisement.

Despite this argument, it is unlikely the special characteristics of broadcast media will be used to strengthen the protection given to commercial speech. On the contrary, the tendency has always been to cite the special characteristics of broadcast media to justify more stringent controls over broadcast communications.[55] These special characteristics include the pervasity, immediacy and intrusiveness of broadcasting into the lives of Canadians, and the public ownership of scarce airwaves. The courts have not been swayed by the argument that airwaves are no longer scarce,[56] that the burden of scientifically proving that broadcasting is more pervasive than other means of communication rests on those who so allege,[57] or that any restriction on speech facilitates the deterioration of freedom of expression.[58]

We therefore conclude that the extent of the government's legitimate interest in limiting broadcast commercial expression will be widely defined by our courts. Its wide definition and the judiciary's apparent tendency to merely accept the government's determination of its own interest,[59] would mean a very low level of protection for commercial speech.[60]

D. Justifications for Limiting Commercial Speech

In this part we study the justifications for limiting commercial expression. The same broad types of justifications will be alleged in support of restrictions on commercial speech that are alleged in relation to other restrictions on other forms of expression.[61] To justify advertising restrictions under s. 1 the regulatory body will invoke balance in broadcasting,

allege that unregulated expression may cause harm or, allege that unregulated expression may impair equality rights.

a) Balance in Broadcasting and the American Fairness Doctrine

The American fairness doctrine places an affirmative duty upon broadcasters to broadcast controversial issues of public importance and to broadcast differing viewpoints on these issues.[62] The fairness doctrine applies to all forms of programming, including commercial advertising. In formulating and applying the fairness doctrine, American courts and the F.C.C. have emphasized the content of the broadcast message, not whether it takes the form of a paid advertisement. As long as the issue involved is one of public importance, the broadcaster has the social responsibility to present different sides of the issue, and to do so fairly.

The application of the fairness doctrine to advertising was recognized in the United States as early as 1946, even before commercial speech received constitutional protection, In Re Sam Morris the American Commission stated:[64]

> Differences concerning the relative merits of one product over another do not usually divide the community by raising basic and important social, economic, or political issues. But it must be recognized that under some circumstances it may well do so . . . this controversy . . . may assume the proportions of a controverted issue of public importance. The fact that the occasion for the controversy happens to be the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it as such an issue.

In the United States the broadcaster's obligations under the fairness doctrine vary according to whether, to use the F.C.C.'s categories, the sponsor is engaged in "editorial advertising", "products advertising" or "institutional advertising".

"Editorial" or "advocacy advertising" occurs when a commercial sponsor directly advocates a position. The advertisement is usually nothing more than a paid editorial and the fairness doctrine clearly applies with its regular force because of the advertisement's political content and public programming component. When, however, the advertisement is not overtly political, the fairness doctrine may still apply, depending upon how the advertisement is characterized.

"Products advertising" merely promotes the purchase of a particular product. In theory, the fairness doctrine extended to "products advertising" but its essentially non-controversial nature reduced the need to impose fairness doctrine obligations. In fact, the F.C.C. only applied the fairness doctrine in one case of "product advertising". In the Branzhah case[65] the F.C.C. applied the fairness doctrine to cigarette commercials. The Commission believed the advertisements raised the important public issue of the desirability of smoking. It required the radio station to provide a balanced presentation of differing views on this issue of public importance. There were potentially far-reaching consequences of this decision in relation to other controversial products such as alcohol, automobiles, and high cholesterol foods and the Commission was aware that its ruling in Branzhah may have opened the door too far. It subsequently limited its decision to the "unique situation"

of cigarettes and refused to impose any further fairness obligations on product advertisers.[66]

In the Fairness Report[67] the F.C.C. studied the question of fairness in "product advertising" and reversed Branzhah. It decided that fairness doctrine values were inappropriate in the product advertising context. The Commission justified its reversal in the following terms:[68]

> [w]hile such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine [to facilitate the development of informed public opinion] . . . We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue.

Its revised position has been justified on the basis that it grants greater protection to the broadcaster's freedom of expression, alleviates the potentially devasting economic consequences of forcing broadcasters to donate air time for counter-programming (rather than selling it for other advertisements) and reduces administrative and enforcement difficulties.[69]

For many reasons, it is unlikely Canadian courts will impose fairness obligations upon strictly commercial "product advertising". First, the fairness doctrine does not apply in Canada and it is unlikely notions like balance in broadcasting would be relevant to product advertising. Second, it would be surprising if Canadians extended fairness doctrine ideas into an area

where the Americans have, specifically and by legislative amendment, exempted its application. Third, the reluctance to impose fairness obligations on "product advertising" is argued to be economically and practically justifiable. Fourth, the failure to impose fairness obligations on this type of advertising is merely another aspect of the reduced constitutional protection freedom of commercial expression will probably enjoy. In the area of product advertising the major justification for limiting commercial expression will be the harm this type of expression may cause and not whether it upsets balanced broadcasting.

A third type of advertising falls between "editorial advertising" and "product advertising". In "institutional advertising", the advertisement is said to promote the overall image of its sponsor and only indirectly promote the sponsor's product. In the United States "institutional advertising" can raise controversial issues of public concern and attract the obligations of the fairness doctrine. These ads may implicitly advocate a position and the closer they resemble "editorial advertising" the easier it is to hold them to the higher standard of "editorial advertising". The problem, however, is determining when an ad implicitly advocates a position such that it will be classified as an institutional as opposed to a product advertisement.

Take for example, a Petro-Can commercial which emphasized the need for a national oil company, owned by Canadians and exploring the Canada lands at a time when there was vigorous public debate concerning the National Energy Program and Petro-Can's "back-in" exploration rights. This example highlights the difficulty of characterizing different types of advertising as what issues

will be controversial and of public importance will vary according to the political sensitivities of the day and perhaps, due to Canada's regional diversity, where the advertisement is aired. Courts and regulators will be faced with the difficult task of deciding how obviously the advertisement must raise a controversial issue before it stops being a "product advertisement" and becomes an "institution advertisement". A few specific questions highlight the contextual nature of this characterization: how far should regulators/courts look for an implicit message, what relative emphasis should be placed on the wording of the text compared to the effect of the visual presentation and what weight should be given to the sponsor's intention? The ambiguity raised by these questions would make it difficult to enforce fairness and balance obligations vigorously.

In the United States the Fairness Report provided that licensees need:[70]

> "do nothing more than make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance."

While this standard has been criticized,[71] it was estimated that fewer than one percent of American advertisements qualified as institutional advertisements raising issues of public concern.[72] Although the fairness doctrine implications of institutional advertising may pose certain thorny theoretical problems, they are unlikely to become matters of pressing practical concern.

In conclusion, the viewers' or listeners' rights of free expression, embodied in and protected by ideas of fairness and balance in broadcasting, constitute a credible basis for justifying regulations on advertisements which qualify as "editoral" or "advocacy advertisements". These advertisements resemble political speech because they advocate an opinion on a matter of public importance. Although the sponsor's right to engage in political speech can be expected to receive greater constitutional protection, this same level of greater protection will also be accorded to the listener's right to freedom of expression. As long as a proposed limitation is prescribed by law, the listener's rights of political counterspeech can be used to argue that the limitation is reasonable and justifiable in a free and democratic society. It will be much more difficult, however, to regulate product advertisements on the basis of the listener's freedom of expression because product advertising does not usually generate or reflect public controversy on important matters. To the extent that institutional advertising can be adequately defined, it may arguably be restricted when fairness, balance require it.

b) The Prevention of Harm

A second justification for restricting free expression is based on the prevention of harm. As free commercial expression may cause damage, restrictions are often argued to be justified on the basis that they are required to prevent "harm". When this justification is invoked it is alleged that the harm to society which may result from unregulated expression is greater than the harm which may result from its restriction. Defining "harm" is a highly selective, subjective process and different standards emerge depending upon one's perspective on freedom of expression.

Particular types of harm have been recognized as justifying restrictions on free commercial expression. Advertisements of illegal products can clearly be prohibited. Cases and commentaries also are clear that the government maintains a strong interest in preventing the harm caused by false or misleading advertising. The first recognition of constitutional protection to commercial speech in the United States carried the proviso that false speech was not protected. According to Mr. Justice Blackman in Virginia State Board of Pharmacy "untruthful speech, commercial or otherwise, has never been protected for its own sake."[73] Although American courts have been asked to judge the content of constitutionally protected speech in the context of commercial advertising, they nevertheless maintain that false advertising restrictions are necessary.[74] They reason that there is no right in the speaker to spread falsehoods, that the advertiser is in a position to verify the accuracy of factual representations it makes and that advertisers should be obliged to choose ways, statement, designs and devices which will not deceive. Nor is the prima facie case for restricting false advertising weakened by the claims that a listener may have a right to hear falsehoods or that controls may improperly "chill" commercial speech. In a C.R.T.C. opinion poll it was found that most Canadians want the government to ensure the truthfulness of commercials,[75] and in the context of commercial advertising, there is little need "to sanction some falsehood to protect speech that matters".[76] If such restrictions meet the s. 1 requirement that they be prescribed by law,[77] the government may restrict untruthful and unjustified advertising claims.

Where, however, a commercial advertisement promotes a legal product and its content is truthful, the extent to which restrictions can be justified on the basis of "harm" is not clear. In Canada, advertisements on certain legal products are controlled or prohibited on the basis that their promotion through broadcasting is undesirable, promotes consumption and will likely cause harm. Regulated substances includes alcohol, wine, beer, cider, drugs cosmetics and medical devices. The propriety of these regulations depends upon the manner and extent of regulation, how courts define harm, and how far they are prepared to question the government's claim that the restriction is in the "public interest".

Where regulation amounts to a prohibition or ban, or works as censorship, it may be more difficult to justify. Traditionally, the prior restraint of constitutionally protected speech has been judged against a strict standard of harm. Prohibitions or systems of prior review have been reserved for situations of especially serious or irreparable harm. Prior restraint is criticized because it promotes self-censorship,[78] relies upon "adjudication in the abstract", as the actual consequences or harms can never be known or judged if the speech is suppressed,[79] encourages regulatory agents to overuse their powers of review[80] and adversely affects an audience's reception of controversial messages.[81] While this last criticism is usually directed to the reduced spontaneity and time delay associated with prior restraint, we add that the knowledge that advertisements are subject to prior approval may give a greater credibility and legitimacy to those advertisements which are approved. The approval process may have the unintended effect of encouraging consumers to "let down their guard" when viewing approved advertisements.

American cases are divided on the constitutionality of advertising bans concerning legal but harmful or undesirable products.[82] In the Virginia State Board of Pharmacy case the Supreme Court emphasized that a complete prohibition would be treated differently from less pervasive or intrusive regulatory methods.[83] The court suggested that restrictions on the time, place or manner of commercial speech would be appropriate if they did not affect the content of the regulated speech. In cases where an advertising ban was upheld, the courts emphasized the government's interest in preventing the dissemination of information concerning harmful products. On the other hand, where advertising bans were struck down as unconstitutional, the courts decided that the government's use of an absolute prohibition was unwarranted. They suggested the means of regulation chosen was overbroad and exceeded the extent of the government's legitimate interest.

The judicial definition of harm will determine when restrictions on commercial speech can be justified on this basis. Proponents of advertising restrictions analogize the advertising of "undesirable" products with the recognized categories of illegal and untruthful advertising. In the case of alcohol they argue that the promotion of alcohol use through advertising encourages such illegal activities as impaired driving and/or drinking in prohibited places. They also allege that certain forms of advertising for alcohol are misleading in the sense that they attempt to show the use of the product as acceptable and desirable conduct. Those advancing restrictions on alcoholic advertisements also allege that increased consumption, encouraged by the advertisements, causes harm to individual users and causes economic harm to

society at large. They cite personal and economic problems related to the use of alcohol and dependency upon it.[84]

The American courts have accepted this type as a justification for limiting commercial expression. In Dunnigan v. City of Oxford[85] where the court held that the advertising ban on liquor was not more extensive than necessary, it reasoned "that the state here believes that the advertising itself represents a hazard to the health, safety and welfare of its citizens. The restrictions permit certain types of informational advertising of use to the consumer such as price advertising inside licenced premises that bar those displays that it believes will encourage excessive consumption."[86]

The weight accorded to a consumer's or listener's right to know will be an important factor in a court's decision on whether such a limitation on commercial expression is "reasonable". Restrictions would be tested against a more rigorous standard of harm if one focuses on the listener's right to that information and the importance of commercial information to public opinion. Many cases emphasize the necessity of protecting consumers by providing maximum reliable information and therefore, promoting maximum freedom of expression. Maximum freedom of expression is said to require not only freedom in the speaker, but also freedom to receive messages by the listener and freedom in the communication process itself.[87] In certain American cases, a "paternalistic"[88] approach to controlling what commercial messages reach citizens has been rejected in favour of a policy of few restrictions which is based on the autonomy of the listener.[89] The test of harm may be relaxed if the speaker's interest in promoting its product is emphasized. The alternative

focus on the rights of the speaker or rights of the listener will be important in relation to justifying restrictions on the commercial advertising of controversial objects like cigarettes, alcohol, birth control and the fee scales of certain professionals.

Even if Canadian courts recognize and emphasize a consumer's right to know,[90] it is important to realize that it is only a generalized right to know, not a right to know acquired in a particular manner. The dissemination of information through a particular mode of communication may therefore be limited, as long as the information is likely to reach the listener in another form.[91] The definition and standard of harm the courts will employ may be affected by these factors.

The rigour with which courts review the government's claim of harm will also affect the level of constitutional protection commercial speech will enjoy. Both Canadian and American courts appear to accept the government's claim of harm at face value. In Oklahoma Telecasters Association v. Crisp[92] the American court found no First Amendment violation in an Oklahoma provision that stated: "it shall be unlawful for any person, firm or corporation to advertise the sale of alcoholic beverages within the state of Oklahoma, except one sign that the retail outlet bearing the words 'retail alcohol liquor store' ". The court recognized that the government had an interest in prohibiting the advertising of alcoholic beverages to reduce the sale and consumption of liquor and thereby reduce the problems associated with alcohol.[93] The alcohol industry challenged the Oklahoma provision on the theory that the provision did not directly advance the asserted state interest. They argued there was no

evidence that prohibition of alcohol advertising would reduce alcoholic consumption. Although the court did not delve into this submission it noted that "the entire economy of the industries that bring these challenges is based on the belief that advertising increases sale".[94] The court felt that the ban was not more extensive than necessary to serve the government's legitimate interest. A major factor in the court's finding was that advertising in other media was still allowed. This is a very important consideration because it indicates that a partial ban, prohibiting only television ads that encourage alcoholic consumption, is more likely to be upheld than a total ban on all forms of alcoholic advertising.

The court's judgment concerning the relationship of advertising and behaviour is crucial. We therefore conclude that laws which limit the permissible dissemination of information about certain commodities because of the potential harm resulting from those commodities, even though they were not thought to be a sufficiently demonstrable harm to warrant outright prohibition of their sale, may possibly be upheld under s. 1 as reasonable limitations. It may, however, be difficult to define what substances should qualify as harmful substances for the purposes of the foregoing analysis. While the use of alcohol and cigarettes is known to cause physical harms, the "harm" associated with the advertising of such things as birth control devices is not as evident.

A special type of harm concerns advertising directed towards children. We anticipate that as broadcasting is uniquely accessible to children, even those too young to read, legislators may protect children in instances where similar controls directed at adults would be unreasonable and outside s. 1.[95] It is

argued that children are incapable of making complex consumer judgments. They are said to be doubly disadvantaged by both the content of the commercials directed at them and their lack of analytical and judgmental development.[96] For this reason advertisements directed primarily at children are often viewed as an inherently deceptive trade practice.[97] The legislature can therefore regulate advertisements directed at children much more fully than other advertisements. Restricting adult access is often seen as a necessary part of the wider power to regulate in relation to children and will not generally invalidate controls which are directed at children, but incidently affect adults.[98] This is because there can be no physical separation between audiences during most broadcast hours because both unsupervised children and adults are likely to be within the audience.[99]

In conclusion, as commercial speech will likely receive only minimal constitutional protection it can be expected that the courts will uphold legislative restrictions under the justification for harm on wider grounds than for more protected types of speech, like political speech. Even though the manner of regulation may involve prohibitions or a system of prior approval, the regulation of broadcast commercial advertisements will probably be subjected to only limited judicial review. The judiciary's concept of harm will often vary according to whether the court focuses on the listener's right to know or the government's assessment of harm. The courts have, however, recognized that advertising controls are appropriate to prevent the harm associated with illegal products, untruthful advertising, the promotion of the use of undesirable but legal products and advertisements directed towards children. The courts do not appear to rigorously evaluate the government's

assessment of the existence and extent of the harm, nor the appropriateness of the chosen legislative method of regulation. For example, in relation to liquor advertisements, the promotion of an undesirable but legal product, the American courts agreed that these advertisements were harmful, assumed that advertisements resulted in increased consumption and were not persuaded that counterspeech or the balance of "anti-drinking" commercials would be a more appropriate method of regulation than prohibition.

c) The Preservation of Equality Rights

The last justification for limiting commercial expression is when unregulated expression may harm or impair equality rights. As in the broader justification of harm, whether a limitation will be reasonable and justifiable in a free and democratic country depends on the extent of the limitation, the judicial definition of harm and the level of proof the judiciary requires to establish the existence of harm. In this area, however, there is further ambiguity caused by the scope of the Charter's protection of equality rights under s. 15 and the further protection of gender equality in s. 28. As explained in Chapter 5 equality rights may operate as a justification for limiting commercial expression or a source of government liability, where it fails to fulfill the positive obligations which may arise under s. 15.

Section 15 guarantees the equal benefit and protection of the law and equality before the law and equality under the law. It prohibits discrimination on the basis of religion, race, national origin, age, sex or mental or physical disability. Sex role stereotyping has received a lot of attention in the last few years. A CRTC committee studied this subject and released a

report in 1982 called Images of Women.[100] This study reported the widespread stereotyping of women in all aspects of programming, including commercials, and suggested self-regulatory and educational approaches to alleviate the problem. Voluntary industry guidelines exist which try to reduce sex role stereotyping in broadcast commercials.[101] The government has also prohibited abusive comments and pictorial representations which would affect certain types of exceptional advertisements.

In order to regulate the sex or race stereotyping in commercials the government must establish that it is reasonable to do so. If it alleges that the preservation of equality rights justifies the regulation it must establish that the use of stereotypes impairs equality rights. By its very terms, a stereotype emphasizes group affiliation at the expense of individual integrity, but advertiser's argue that the use of stereotypes is diminishing and does not promote inequality. They claim that the continuation of certain traditional views concerning the roles of men and women are justified in terms of market segregation and merely reinforce the audience's pre-existing ideas.

In response to a two year program of self-regulation the CRTC published Sex-Role Stereotyping in the Broadcast Media to gage its effectiveness and canvass the government broadcaster's, the advertising industry and the public reaction.[102] In their comments on this review, advertisers emphasized that they must be allowed to represent society "as it is" rather than presenting it as "some may wish it to be." They claim that any regulation in this area must consider their marketing considerations including targeting, commercial pools and consumer research. In greater detail, they argue:[103]

> Canadian society, generally speaking, has not totally discarded all the traditional concepts of "masculinity" and "femininity", or relationships based on the age-old attraction between the sexes. But though traditional concepts may still have a valid role, it is no longer an exclusive role. And, regardless of the pace of economic and societal change, some research shows that many if not most women still consider themselves to be the major purchasers and uses of certain products, so it is appropriate to continue to portray them in those roles. However, there are those who disagree with such perceptions and demand that advertisements be modified so as to protray society as they would like it to be. But from the advertiser's point of view, conforming to the wishes of these critics could alienate others in the marketplace, endanger positioning, and, in the end, adversely affect sales.

Despite this argument the mere profitability of inequality is insufficient to maintain its practice in light of the terms of s. 15. The content of rights is not to be determined by what a segment of the commercial community judges to be prevailing public opinion. The government would therefore have a legitimate and reasonable interest in regulating the content of stereotypic presentations contained in commercial advertising.

E. Conclusion

It is to be expected that commercial speech will be treated differently than other forms of speech of expression, due to its essentially economic motivation. We anticipate that, unlike the initial American experience,

freedom of expression in advertising will receive constitutional protection. The rationale for protecting expression can be said to apply to commercial speech, although with less force. The expansive wording of s. 2 and the scheme of the Charter, where broad rights are limited by s. 1, suggest that the line of Canadian cases which give constitutional protection to commercial speech will be followed in the future.

Although commercial speech will receive some protection, its differences from political speech and the unique characteristics of the broadcast media combine to suggest that the American tendency to give a lower level of scrutiny to infringements on commercial speech will be mirrored in Canada. The greater objectivity of determing when commercial speech is inaccurate, its hardiness and pervasiveness make it less likely restrictions would silence a potential speaker. The pervasity, immediacy and intrusiveness of broadcasting and the public ownership of the airwaves are additional factors to be considered by the courts. We can therefore expect that the government will be found to discharge its burden of proof under s. 1 more easily than more protected forms of expression.

Assuming the limitation is sufficiently prescribed by law under s. 1, the government will attempt to show the limitation is reasonable on the cumulative grounds that it is required by balance in broadcasting, helps prevent harm, or preserves equality rights. The fairness doctrine may place a duty on broadcasters to fairly broadcast issues of public importance where the advertisement qualifies as an "editorial advertisement" or an "institutional advertisement" which impliedly raises a controversial issue while promoting the overall image

of its sponsor. It is highly unlikely that fairness and balance in broadcasting can be used to justify restrictions in the case of "product advertising."

It is difficult to predict the extent of the government's power to regulate commercial expression because of the harm which may result from unregulated expression. This difficulty results from not yet knowing whether the courts will emphasize the rights of the speaker or the listener, the extent to which they will support the prior restraint of expression through prohibition or prior review, how they will define harm, and the level of proof they will require to establish the existence of harm. Similar considerations also make it difficult to predict where the line will be drawn between the advertiser's freedom of expression and the equality rights of viewers and groups represented. In this part the newness of the Charter, the recent modification of the American position, and the outlined competing interests make it difficult to draw any definitive lines behind which legislative restrictions are safe and beyond which they cannot go. We have, however, attempted to outline the general principles and considerations which we expect will guide a court's analysis and determination.

FOOTNOTES

1. Thomas H. Jackson and John Calvin Jeffries Jr., "Commercial Speech: Economic Due Process and the First Amendment (1979), 65 Va. L. Rev. 1 at 1.
2. Thomas W. Merrill, "First Protection Amendment for Commercial Speech" (1976), 44 U. Chi. L. Rev. 205 at 222. He deals extensively with what forms of expression should qualify as commercial speech.
3. R.S.C. 1970, c. C-23 as am.
4. R.S.C. 1970, c. F-27 as am.
5. R.S.C. 1970, c. H-3 as am.
6. R.S.C. 1970, c. C-34 as am.
7. R.S.C. 1970, c. T-10 as am.
8. R.S.C. 1970, c. C-30 as am.
9. The licences require Adherence to the Broadcast Code for Advertising to Children, which in turn requires pre-clearance by the Children's Section of the Advertising Standards Council and le Conseil des normes de la publicite. See C.R.T.C. Broadcast Advertising Handbook. Advertisers have the right to appeal the decisions of the pre-clearance officers.
10. Under s. 33 the Charter only applies to government action.
11. (1942), 316 U.S. at 54.
12. (1951), 341 U.S.
13. New York v. Collins, 323 U.S., at 533; Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); Jamison v. Texas, 318 U.S. 413, 417 (1943).
14. (1975), 425 U.S. 748.

15. There was some indications in Pittsburg Press Co. v. Human Rel. Comm'n. (1973), 413 U.S. 376, 384 and New York Times v. Sullivan (1964), 376 U.S. 254 at 266 but the first decision where the issue was raised directly was Bigetow v. Virginia (1974) 421 U.S. 809. In that case the defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. The Supreme Court rejected the contention that the publication was unprotected because it was commercial but commented (at 822) that the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear public interest." At 825 the court observed:

> "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit".

As this case dealt with something of constitutional interest, the recognized right to abortion, it arguably did not necessarily establish constitutional protection for purely commercial speech.

16. Even before this decision it appeared that this health factor was making somewhat of a special case of the prohibition against drug price advertising. Such prohibitions were often struck down. See Florida Board of Pharmacy v. Webb's City, Inc., 219 So. 2d 6681 (Fla. 1969); Maryland Board of Pharmacy v. Save-A-Lot, Inc., (1970), 270 Md. 103, 311 A. 2d 242; Pennsylvania State Board of Pharmacy v. Pastor, (1971), 441 Pa. 186, 272 A. 2d 487.

17. Supra, n. 14 at 765.

18. (1979), 447 U.S. 557.

19. Ibid., at 563.

20. Ibid., at 566.

21. The recognition that commercial speech merits First Amendment protection has been responsible for invalidating a municipal ordinance prohibiting, "for sale" signs, in Linmark Associates Inc. v. Township of Willingboro (1977), 431 U.S. 85, invalidating a state prohibition against advertising by lawyers Bates v. State Bar of Arizona (1978), 436 U.S. 447, and overturning banning non-commercial billboards Metromedia Inc. v. City of San Diego (1981), 101 S. Ct. 2882.

22. Peter Hogg, Constitutional Law in Canada, 2nd ed. (1985), at 714.

23. Supra, n. 14 at 763 the Court even recognized that a consumer's interest in the free flow of commercial information may exceed his interest in the day's most urgent political debate.

24. Supra, n. 15 at 825-826.

25. Ibid., Mr. Justice Stewart at 781.

26. T.H. Jackson and J.C. Jeffries, supra, n. 1 at 6; Baker, Commercial Speech: A Problem in the Theory of Freedom (1976), 62 Iowa L. Rev. 1.

27. It is both artificial and difficult to differentiate between commercial and non-commercial speech under s. 2 as there are usually some non-commercial expression of ideas and values in commercial speech. See Ronald D. Rolunda, "The Commercial Speech Doctrine in the Supreme Court" (1976), U. Ill. L. F. 1080 at 1091 and Peter Hogg, Constitutional Law in Canada 2nd ed. (1985), at 715.

28. The remarks of Mr. Justice Rehnquist in Virginia Board of Pharmacy v.

Virginia Consumer Council, supra, n. 14 at 781 are representative of this fear:

> The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise.

29. [1982] 2 S.C.R. 307.

30. Legal Professions Act, R.S.B.C. 1960, c. 214 (now Barristers and Solicitors Act, R.S.B.C. 1979, c. 26).

31. Combines Investigation Act, R.S.C. 1970, c. C-23.

32. Supra, n. 29 at 363. He addressed the the legality of restrictions on commercial speech in the following manner: "where the right is not entrenched behind the reach of Parliament or Legislature, as has been done for example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law."

33. He approved the following quote from Lord Wright in James v. Commonwealth, [1936] A.C. 578 at 627:

> "speech does not mean free speech; it means speech hedged in by the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law."

34. Ibid. at 364. The court was also influenced by the consideration that a professional society was merely restricting certain activities of its licensed members.

35. (1985), 50 O.R. (2d) 118, 16 D.L.R. (4th) 489. (Ont. Div. Ct.).

36. Ibid., at 160-61.

37. Ibid.

38. [1985] 5 W.W.R. 426 (Alta. Q.B.).

39. 1979, 2 S.C.R. 435 at 469 he said:

> "The primary purpose of commercial advertising is to advance the economical welfare of the newspaper. That part of the paper is not concerned with freedom of speech on matters of public concern as a condition of democratic policy, but rather with the provision of a "service or facility customarily available to the public" with a view to profit".

Callaghan relies upon this statement as a justification for differentiating political speech from economic speech under the Charter.

40. He sets out theoretical principles which should guide the interpretation of the Charter and doesn't follow them. He acknowledges that Charter rights are wide and that limitations come from s. 1 and not individual sections, but then uses a blanket disqualification against commercial speech as a form of expression.

41. Supra, n. 35 at 160.

42. [1983] 1 D.L.R. (4th) 285.

43. Law Society Act R.S.M. 1970, c. L-100 ss. 29(1)(w) (am. 1980, c. 8, s. 4).

44. Supra n. 35 at 299.

45. (1983), 9 C.C.C. (3d) 411 (Ont. P. Ct.).

46. C.R.C. 1978, 1605, s. 336.

47. Supra, n. 45 at 424.

48. Dicta in Re Koumoudouros et al. and Municipality of Metro Toronto (1984), 45 O.R. (2d) 426 concerned the proper scope of freedom of expression in s. 2. The city's bylaw, which required adult entertainers to wear opaque clothing covering the pubic area, was attacked on the basis that it

infringed "artistic" expression. All members of the court upheld the bylaw. Mr. Justice Eberle, Sirois J. concurring, outlined at 435 that the "thrust of s. 2(b) is in the political and governmental domain; a domain in which the freedom of thought, belief, opinion and expression are inseparable from a free and democratic society" but noted that it would be unwise to determine the precise ambit of freedom of expression. Mr. Justice Osler gave an expansive reading to freedom of expression and felt it could not be confined to the political and governmental domain or to communication.

49. Supra, n. 14.

50. From T.W. Merrill, supra, n. 2 at 222.

51. See Ohralick v. Ohio State Bar Ass'n. (1978), 436 U.S. 447 at 456 where the court commented that "parity of constitutional protection for commercial and non-commercial speech would devitalize the amendment's guarantee with respect to political speech."

52. Ibid., at 772. In a separate judgment Mr. Justice Berger echoed these sentiments at 774.

53. (1977), 433 U.S. 350 at 381.

54. T.W. Merril, supra, n. 2 at 251.

55. F.C.C. v. Pacifica Found. (1979), 438 U.S. 726.

56. Mark S. Fowler and Daniel Brenner, "Marketplace Approach to Broadcast Regulation" (1982), 60 Tex. L. Rev. 201 at 221.

57. Spitzer, "Controlling the Context of Print and Broadcast" (1985), S. Cal. L. Rev. argues that before a different constitutional treatment is given to media, the special impact of media must be proven.

58. M.S. Fowler and D. Brenner, supra, n. 56.

59. See Bruce Dunlop, "Is Competition Unbecoming"? (1983), 8 Can. Bus. L.J. 235 at 242 where he asks whether the law profession's desire to disallow competition as "unbecoming" is sufficient justification under s. 1? The author hopes courts will require evidence that a ban on advertising is in the public interest and not just accept the Bencher's assertions. In Re Law Society of Manitoba v. Savino, supra, n. 42 at 299 Mr. Justice Huband commented that rules regulating advertising within a professional body would normally fall within s. 1 and Monnin commented that it was "not an unreasonable request if the Society has to monitor and check upon such advertisements for the greater benefits of its members and the public."
60. This will make it easier for a government to maintain a justification for limiting free expression.
61. See sections 1-4 of the Report.
62. Supra, n. 59 at 294.
63. See section 3 of the Report.
64. For a detailed and excellent review of the issues see Steven J. Simmons, "Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective" (1975), 75 Colum. L. Rev. 1083.
65. (1946), 11 F.C.C. 197 at 198 and 199.
66. WCBS-TV (1967), 8 F.C.C. 2d 381.
67. Steve Simmons, "Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective" (1975), 75 Column. L. Rev. 1083.
68. The Fairness Report, Federal Register, July 18, 1974.
69. Ibid., at 26381.
70. S. Simmons, supra, n. 67 at 1106 et seq.

71. Supra, n. 68 at 26380-81. "This determination cannot be made in a vacuum; in addition to his review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate. Indeed, this relationship of the ad to the debate being carried on in the community is critical. If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference . . . the fairness doctrine would clearly not be applicable. . . . The situation would be different, however, if that relationship could be shown to be both substantial and obvious. For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations."
72. See Jaffe, "The Editorial Responsibilities of the Broadcaster: Reflection on Fairness and Access" (1972), Harv. L. Rev. 768 at 777-78 would require balance whenever, even by implication, the advertiser extends to speak to a current and publicly acknowledge controversy.
73. S. Simmons, supra, n. 67 at 1103.
74. Supra, n. 14 at 77.
75. In Jabour v. The Law Society of British Columbia, [1982] 2 S.C.R. 307 at 365 in an obiter statement discussing the permissible limits upon free speech, Mr. Justice Estey said that a restriction in the form of misleading advertising is a lawful regulatory restriction on freedom of economic speech. Similar dicta can be found in all commercial speech cases in Canada.

76. C.R.T.C. Attitudes of Canadians Towards Advertising or Television, Ottawa, (1978) at 37.

77. Mr. Justice Stewart in Virginia Board of Pharmacy v. Consumer Council, supra, n. 14 at 778.

78. This element is discussed in Part 1 and is treated extensively by Marie Alison Finkelstein, "Selected Social Issues in Programming: The Legal, Constitutional and Policy Implications of the Equality Provision in Bill C-20. A research paper prepared for the Federal Task Force on Broadcasting Policy, unpublished, at 105 et seq.

79. Viscount Blase, "Toward a Theory of Prior Restraint is the Central Linkage" (1981-82) 66 Minn. L. Rev. 11 at 93.

80. Ibid., at 74. He believes prohibition is based on the distrust of the speaker and listener and endorses Milton's view that the effect of ideas cannot be judged unless they are disseminated.

81. Ibid., at 93.

82. Ibid., at 63.

83. See Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n. (1982), 539 F. Supp. 817 rev'd on rehearing sub nom. Dunagin v. City of Oxford (1983), 718 F.2d 738; Oklahoma Telecasters Ass'n. v. Crisp (1982), 8 Media L. Rep. 1097, rev'd, 1983 699 F.2d 490 (1983), rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984); Dunagin v. City of Oxford, 489 F. Supp. 763 (N.D. Miss. 1980), rev'd, 701 F.2d 335 (per curiam), aff'd on rehearing, 718 F.2d 738 (5th Cir. 1983) (en banc), cert. denied, 104 S. Ct. 3553 (1984).

84. Supra, n. 14 at 771.

85. Supra, n. 79 at 82.

86. Ibid., at 751.

87. Jonathan Weinberg, "Constitutional Protection of Commercial Speech" (1982), 82 Colum. L. Rev. 720 at 730 et seq.

88. In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra, n. 14 at 770 the Court said:

> an alternative to this highly paternalistic approach . . . is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

89. For a discussion of the relationship between commercial expression and the autonomy of the listener see Mathew L. Miller, "The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements", [1985] Col. L. Rev. 632 at 647 et seq.

90. The few Canadian cases which discuss commercial speech have focussed upon the rights of the speaker and not the rights of the listener. In most cases there is no discussion of the public's right to know.

91. J. Weinberg, supra, n. 87 at 730.

92. For a full discussion of this position see Marc L. Sherman, "We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television", [1985] 58 South. Cal. L. Rev. 1107.

93. Supra, n. 79.

94. Ibid., at 500. This is also mirrored in Dunagin v. City of Oxford, supra, n. 87 at 749:

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and

> dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society, and it talks here in support of Mississippi's concerns.

95. Ibid., at 501.

96. For a full discussion see Molly Pauker, "The Case for FTC Regulation of Television Advertising Directed Toward Children" (1980), 46 Brooklynn L. Rev.

97. See F.C.C. v. Pacifica Foundation (1977), 438 U.S. 726 at 749.

98. Ibid.

99. Ibid.

100. Government of Canada, Images of Women (1982).

101. Government of Canada, Sex Role Stereotyping in the Broadcast Media at 65 provides a statement of Industry Guidelines:

    1. Advertising should recognize the changing roles of men and women in today's society and reflect a broad range of occupations for all.

    2. Advertising should reflect a contemporary family structure showing men, women, and children as supportive participants in home management and household tasks, and equally as beneficiaries of the positive attributes of family life.

    3. Advertising, in keeping with the nature of the market and the product, should reflect the wide spectrum of Canadian life, portraying men and women of various ages, backgrounds, and appearances, actively pursuing a wide range of interests--sports, hobbies, business--as well as home-centered activities.

    4. Advertising should reflect the realities of life in terms of the intellectual and emotional equality of the sexes by showing men and women as comparably capable, resourceful, self-confident, intelligent, imaginative, and independent.

    5. Advertising should emphasize the positive, personal benefits derived from products or services and avoid portraying any excessive dependence on or excessive need for them.

    6. Advertising should not exploit women or men purely for attention-getting purposes. Their presence should be relevant to the advertised product.

7. SOME CONCLUDING COMMENTS ON THE FORM OF REGULATION AND FREEDOM OF EXPRESSION

In the other chapters we discuss how the content of legislation could be justified if it restricted freedom of communication. In this concluding chapter our emphasis shifts from the content of broadcasting regulation to its form. There are many ways to regulate broadcasting, each with a different effect on freedom of communication. A regulatory system with powers of prior restraint, censorship or injunction represents the greatest restriction on freedom of expression.[1] A completely self-regulating system, with no legal consequences in the case of non-compliance, is the least restrictive. Between these two alternatives are regulations, statutory offences with ex post facto punishment, and licensing provisions which make the grant, duration, continuation or renewal of the licence conditional on compliance with prescribed standards.

The effect regulations, statutory offences and licensing provisions have on freedom of communication depends upon the legal consequences of their breach. The more serious the consequences, the closer the restriction approximates prior restraint (on the assumption that broadcasters are risk adverse and that the prospect of punishment may deter them from broadcasting). When this deterrence reaches a certain level it approximates a form of constructive, albeit self-imposed, censorship. It must be noted, however, that any system with sanctions is designed to deter breaches from occurring. The line between deterrence and constructive censorship can therefore be very fine indeed.

Under the present regulatory system the CRTC has no legislative mandate to act as a censor.[2] The apparent goal of both the present and proposed regulatory system is to reduce the number of breaches and the damage they cause, without preventing them through prior restraint. To effect this purpose the CRTC possesses four regulatory mechanisms to promote compliance with the content of broadcasting regulations: attaching terms or conditions to a broadcast licence, passing regulations,[3] encouraging and/or requiring broadcasters to regulate themselves, and criminal sanctions under the Criminal Code or the Broadcasting Act. These mechanisms allow for remedies in individual cases and form the basis of the present regulatory system. The severity of those consequences, the likelihood that breaches will be discovered and the chances of the regulating body employing its full legal powers to redress the breach, determine the deterrence value of any given regulatory system. Arguably, the CRTC could have more complete legal powers at its disposal, whether it uses them or not, without engaging in constructive censorship.

Requiring a broadcasting licence is a justifiable restriction on freedom of communication because of the finite number of airwaves.[4] In granting and renewing licences the CRTC can justifiably act in the public interest.[5] Several American cases have held that a licensee's programs could be reviewed to determine whether or not to renew its licence. If the programming was not in the best interest of the public, the licence renewal request was denied. In the case of KFKB Broadcasting Association v. FRC[6] an examination of the station's program content revealed that questionable medical advice was being provided over the air. The FRC decided that the programming "is inimical to the public health and safety, and for that reason is not in the public inter-

est."[7] The broadcaster appealed the decision, arguing the Commission's action amounted to censorship and was not permissible under the legislation. The Court rejected the appellant's arguments, saying the Act's use of the public interest as a standard for renewing standards required that the Commission examine and consider, "the character and quality of the service to be rendered".[8]

In another case, a broadcaster used the air-waves to attack judges, lawyers, unions and the Catholic Church without justification. The Commission denied the licence renewal application for public interest reasons. The broadcaster appealed to the Court, alleging censorship. The Court, in denying the appeal, explained that the denial had nothing to do with constitutional protection of freedom of expression. The denial of the licence:

> is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or in an impairment of their free exercise. Appellant may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve . . . . [H]e may not, as we think demand, of right, the continued use of an instrumentality of commerce for such purposes.[9]

Other American cases support this view.

As broadcasters need a broadcasting licence, the CRTC's control over licences is a powerful regulatory tool. Its jurisdiction to issue, amend,

terminate and renew licences give it the core powers necessary to legally manage broadcasting in Canada, but current powers may not go far enough. The CRTC may not have all the legal powers it needs to effectively regulate broadcasting and it may not use its existing legal powers in the most effective manner possible.

The CRTC currently has the power to issue licences subject to conditions it "deems appropriate for the implementation of the broadcasting policy enunciated in s. 3 of the Broadcasting Act". On one reading of this section the CRTC currently may have the requisite power to impose compliance with program standards as a licence condition. This power should, however, be made expressly certain in any new legislation. As s. 3(c) subordinates the right of freedom of expression to "generally applicable statutes", a phrase which includes the Charter, the Commission can justify the imposition of terms and conditions which promote the balancing of individual rights and fundamental freedoms required by the Charter. Although section 17 of the Broadcasting Act provides that any such condition must be "related to the circumstances of the licensee" it may not prevent the Commission from providing that compliance with appropriate program standards is a condition of the licence.[10]

Another possibility, but considerably less likely, is that the CRTC currently has the power to impose a licencing condition requiring compliance with program standards, as amended from time to time; even if the standards are amended after the licence has been granted. Requiring compliance with the amended standards ensures that all licensees are bound, by the terms and conditions of their licences, by the same regulations and by the most current

regulations. This result can be effected by what is known as a "compliance with laws provision". It is a potent licensing condition which effectively authorizes midstream variations to the licence. Incorporating regulatory changes into the terms of a licence means that new regulations would operate in two ways: separately and generally as regulations and as conditions of the licence. The regulations would be incorporated by reference into the licence. Such a compliance with laws clause must be appropriately worded. It must be understood that it is the broadcasting regulations which exist from time to time, and not the broadcasting regulations which existed at the time the licence was granted, that will form part of the licence. If compliance with new regulations becomes a condition of the licence the licensee is effectively forewarned that new licence terms can properly be imposed during the currency of the licence.

It is doubtful whether the Commission currently has the power to insert a compliance with laws provision in a broadcasting licence. It depends upon whether a compliance with laws provision qualifies as a licence "amendment" under s. 17(1)(b) of the Broadcasting Act. If "amendment" means any type of change the compliance with laws provision would be caught and the Commission's powers would be limited, as it can only amend a licence on the application of the licensee. There is an argument, however, that no "amendment" occurs under a compliance with laws provision as the licensee has implicitly consented to midstream licence variations. This argument presupposes that the "amendment" referred to in s. 17 requires unilateral change, imposed by the Commission, which would not be present where the licensee knows of possible future variations. On balance, the CRTC probably does not have the power to insert a

compliance with laws provision, because such a clause effectively probably operates as an "amendment" under the present Act. The ability to insert a compliance with laws provision, thereby augmenting the CRTC's regulatory powers, should be considered when canvassing amendments to the Broadcasting Act.

If the Commission cannot insert a compliance with laws provision, its other licencing powers become crucial. The Commission should possess the widest possible powers over broadcasting licences as the threat to the continuation of a broadcasting licence probably may provide an effective incentive to comply with programming standards. For this reason, it should also be considered whether the Commission should be given wider powers to control the duration, renewal, amendment, suspension and termination of licences. More extensive legal powers need not change the Commission's practices or the cooperation which has typically characterized the relationship between the CRTC and its licensees. They would merely strengthen the Commission's hand should the need arise in an individual case and reinforce the government's commitment to effectively regulating a powerful medium.

Licence duration is very important in a regulatory system where the CRTC cannot unilaterally amend the licence, where its powers of suspension and cancellation are limited and where the licencing terms and conditions it can impose at the time of renewal are restricted. In such a system the original licence terms and conditions are likely to prevail despite changed social, political or economic circumstances. If the duration is too long it increases the possibility that earlier licence terms and conditions will not reflect

changed realities. To the extent that the Commission cannot, or will not terminate a licence for breach, it also effectively allows transgressors to improperly retain their licences until they expire on their own terms. An optimal duration balances these two considerations with the licensee's desire for security of tenure. Perhaps lengthening the duration of licences to seven years, as proposed in the amendments to the Broadcasting Act, should be reconsidered as being too long.

In conclusion, the CRTC's jurisdiction over broadcasting licences is perhaps its most effective management tool and its legal powers should therefore be more clearly stated and broadly defined. The Commission should have the power to impose terms and conditions consistent with its mandate, without any limitation which relates to the circumstances of the licensee. The power to amend licences is most effectively reserved by inserting a compliance with laws provision in the licence, but it can also be achieved in the alternative way of giving the Commission the statutory power to unilaterally amend licences, without requiring an application by the licensee. The duration of licences should also be reconsidered and the Commission should maintain the right to suspend, cancel or terminate licences, for cause, on the widest possible grounds.

FOOTNOTES

1. Clare Beckton, "Freedom of Expression" in Gerald Beaudoin and Walter Tarnopolsky ed. Canadian Charter of Rights and Freedoms: A Commentary (1982), 75 at 86.
2. Nor could it appropriate censorship powers to itself. See National Indian Brotherhood v. Juneau (1971), F.C.R. 498.
3. The Commission's extensive powers to enact regulations was upheld in R. v. C.K.O.Y. (1978), 90 D.L.R. (3d) 1 (S.C.C.).
4. Morris Manning, Rights, Freedom and the Courts (Toronto) 1983 at 209 argues that a licensing system for broadcasting can be supported, whereas a licensing system for newspapers cannot, on the need to have an individual responsible for criminal and civil liability and to ensure a fair allocation of available wave length. He warns that "this does not mean, however, that there is right to curtail any private citizen or organization from having access to broadcasting time on radio and television in order that they may put forward their opinions, thoughts and beliefs.
5. The grant of a licence does not convey any proprietary interest in the use of public airways beyond the maximum five year term specified in the licence and applications for licence renewals are judged on the basis of the public interest. Section 17(1)(c).
6. 47 F.2d 670 (D.C. Cir. 1931).
7. Ibid.
8. Ibid.
9. Trinity Methodist Church, S. v. FRC, 62 F.2d 850 (D.C. Cir. 1932), 288 U.S. 599 (1933), at 853.

10. The Frazer Committee Report on Pornography and Prostitution in Canada at 178 et seq. argues that this type of condition is not possible as it offends s. 17 of the Broadcasting Act and places a broadcaster into a position of double jeopardy. We find nothing in the s. 17 limitation which would make compliance with programming standards fall outside the broad and rather ambiguous term "circumstances of the licensee". Similarly, making a breach of a regulation also constitute breach of the licence is a well-know regulatory tool, especially in the licensing of provincially owned resources.